IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-817

NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD COMPANY; THE JOURNAL-STAR PRINTING CO.; WESTERN PUBLISHING CO.; NORTH PLATTE BROADCASTING CO.; NEBRASKA BROADCASTERS ASSOCIATION; ASSOCIATED PRESS; UNITED PRESS INTERNATIONAL; NEBRASKA PROFESSIONAL CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA DELTA CHI; KILEY ARMSTRONG; EDWARD C. NICHOLLS; JAMES HUTTENMAIER; WILLIAM EDDY;
Petitioners,

v.

THE HONORABLE HUGH STUART, JUDGE, District Court of Lincoln County, Nebraska, *et al.*
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Nebraska

BRIEF AMICUS CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

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PRELIMINARY STATEMENT

The American Newspaper Publishers Association (hereinafter "ANPA") submits this brief amicus curiae in support of Petitioners, Nebraska Press Association, Omaha World-Herald Company, The Journal-Star Printing Co., Western Publishing Co., North Platte Broadcasting Co., Nebraska Broadcasters Association, Associated Press, United Press International, Nebraska Professional Chapter of the Society of Professional Journalists/Sigma Delta Chi, Kiley Armstrong, Edward C. Nicholls, James Huttenmaier and William Eddy. All parties to this suit have given their written consent to the filing of this brief. Copies of such consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,140 newspapers representing over ninety-percent of the total daily and Sunday newspaper circulation in the United States. A recent by-law change has allowed an increasing number of non-daily newspapers to join ANPA.

The Omaha World-Herald Company, publisher of the World-Herald, The Journal-Star Printing Co., publisher of the Lincoln Star and Journal and the Western Publishing Company, publisher of the North Platte Telegraph, along with five other daily newspapers in the State of Nebraska, hold membership in ANPA.

Concerned with matters of general significance to the profession of journalism and the newspaper publishing business, ANPA seeks to keep its members abreast of matters touching on these concerns. In that regard, the Association's member newspapers, individually and through ANPA, are ever vigilant to protect the public's right, under the First Amendment, to information concerning the activities of government and matters of public interest. ANPA and its members are vitally interested in protecting and maintaining the primary function of newspapers: the gathering of information for dissemination to the people. To insure the free and uncensored flow of information to the public, daily newspapers and their employees must be free to report happenings in their communities, particularly events taking place in the courtroom, without censorship and "gag" orders.

It is most respectfully and emphatically called to this Court's attention that the Sixth Amendment to the Constitution of the United States calls for "* * * a speedy and public trial, by an impartial jury * * *". The rights granted the press in the First Amendment, no differently than the rights granted an accused under the Sixth Amendment, are not solely the right of the press or of the accused. They are rights of the citizenry. In each instance they are integral parts of the warp and woof of our democratic system of government so ably established initially in 1781, and enhanced by the adoption of the Bill of Rights in 1789. Each of these rights inherently belong to all the people of our country, and each, within the constitutional framework, must relate one to the other in accord with the fact situations surrounding cases as they arise in the courts, as in this instance.

The censorious judgments entered by Judge Stuart in the trial of Erwin Charles Simants in the District Court of Lincoln County, Nebraska and supported in part by Justice Blackmun of this Court and, in turn, by the Supreme Court of Nebraska, represent in ANPA's view clear abrogations of the First Amendment without concurrent justification in this case of any asserted Sixth Amendment rights of the defendant Simants.

Accordingly, we ask this Court to establish herewith a rule of law which can, for the foreseeable future, delineate not some supposed conflict between the First and Sixth Amendments, but rather the co-equal compatibility and mutually supportive nature that these two great instruments of our Bill of Rights were intended to have by those wise draftsmen in 1789.

We attach as Appendix A to this brief the foreword and the report of the ANPA Special Committee on Free Press and Fair Trial which was published in 1967. As Appendix B, we attach the proposals of James Madison, the architect of the Bill of Rights: the proposals made by the House Committee; the proposals sent from the House to the Senate; and the proposals sent from the Senate to the States which eventuated in Articles Third through Twelve being adopted by the States and becoming the Bill of Rights as we know it today, namely the first ten amendments to our Constitution.[1]

[1] As Appendices C and D to this brief, we attach the studies made in support of the Report of the ANPA Committee on Free Press and Fair Trial.

QUESTIONS PRESENTED, CONSTITUTIONAL PROVISIONS INVOLVED AND STATEMENT OF THE CASE

We adopt the questions presented, constitutional provisions involved and statement of the case, all as set forth in the petitioner's brief.

ARGUMENT

The Court's willingness to address itself to the question at hand is of great significance. No case, since Justice Marshall decided *Marbury* v. *Madison*,[2] could require greater soul-searching or result in a more important decision for the people of this Republic than the decision that this Court must render in this instance.

In an effort to be of assistance, we shall briefly recite the historical perspective of the press in this country from colonial times to date so as to lay a foundation from which the Court may reach what we believe to be the right decision and the right guidance for future generations. Too often we neglect history, feeling that what is happening today is brand new and has not been contemplated in the past.

As prologue we would remind the Court that nowhere in the world are people free without a free press and a free judiciary, each able to operate under rules of law guiding both. The history of Nazi Germany reminds us that the first right of the Weimar Republic's people which Hitler destroyed was that of press freedom. And, shortly after the destruction of a free press in Germany, that Republic's independent judicial system also was subverted and destroyed by appointment of Hitler supporters to the bench.

[2] 1 Cranch 137 (1803).

Who can forget the demise of *La Prensa* and the free press of Argentina concurrent with the rise of Juan Peron. And, again in that Republic, the subsequent destruction of the judicial system left protest impossible.

Our memories would be short indeed, if we did not sadly note how India, once looked upon as a progressing democracy in Asia, first censored and gagged its press and then cowed its judiciary into upholding government excesses by Indira Ghandi. To this very day the Indian press is controlled by the government, and the judiciary is controlled by the Executive.

It can be truly said that absent the "Fourth Estate" the Executive Branch of Government, in the form of dictatorship of whatever kind, inevitably overwhelms both the judicial and legislative branches in whatever form they may be created in a given country.

Now let us go to the founding of our nation. In colonial times the greater portion of our heritage stemmed from England. That heritage was the predominant force in the colonization of our original thirteen states. England itself was emerging into a freer society as a result of the Magna Carta, the statutes of Elizabeth and other efforts by the English people to gain greater freedom to express themselves and to develop a parliamentary democracy. Yet, many of the colonists came to this country to avoid submission to either religious or political repression, debtor's prison or some in search of wealth.

It must be remembered that in the earlier days of our nation the predominant influences were those of the merchants and the Anglican Church. The earliest colleges in America were founded by churchmen supported by merchants from England in Massachusetts and Virginia. This influence thus was of the utmost importance in establishing our approach to the common law and to the beginning application of same in this country.

The first formal law school in England was established at Oxford no earlier than the 1740's by William Blackstone, the Vinerian professor of law at Oxford. Contemporaneously in 1750, George Wythe, the first professor of law in America, began the teaching of men such as Thomas Jefferson, John Marshall, Bushrod Washington, and other greats such as Madison, Tyler and Mason in Williamsburg, Virginia.

Why such heavy emphasis on Virginia? In 1776 when the Declaration of Independence was adopted, Virginia ranked number one in population in our country. Pennsylvania was number two, more than 200,000 short of Virginia, and New York ranked but fifth with Massachusetts third and North Carolina fourth in the order of population. Little Maryland ranked sixth, just 3,000 behind New York. Thus the heavy emphasis on the development of our Declaration and our original Constitution and our Bill of Rights stemmed from what was then the center of population in America.[3]

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[3] Populations of the thirteen original states at the time of the Declaration of Independence (1776).

Virginia	567,614	Connecticut	209,149
Pennsylvania	360,000	South Carolina	200,000
Massachusetts	357,511	New Jersey	140,435
North Carolina	270,000	New Hampshire	102,000
New York	257,786	Georgia	90,000
Maryland	254,050	Rhode Island	51,896
		Delaware	37,000

As a part of the British colonial empire, the early American colonies imposed the same sort of domestic press control as did the motherland. In colonial days, American judges and governors were appointed by the Crown, and were generally Tories. They were under great pressure to faithfully implement the Royal will. On February 21, 1682, the Royal Governor of the Colony of Virginia and his Council called John Buchner before them to answer charges that he had printed the Laws of 1680 "without his Excelleney's license." Buchner was found guilty and was ordered "to enter into bond in 100 pounds not to print anything thereafter until His Majesty's pleasure should be known."[4]

In 1683, the new governor of Virginia issued an order that no person be allowed to operate a printing press "on any occasion whatsoever."[5] This order lasted, and stopped printing in Virginia, for fifty years.

Government repression of this sort also was evident forty years later in Massachusetts. On August 21, 1721, James Franklin, the brother of Benjamin Franklin, began to print in Boston, America's fourth newspaper, the *New England Courant*.[6] In the second month of publication, comments were made in the *Courant* which offended the Colonial Assembly. James Franklin was arrested, censured and jailed for one month.

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[4] Douglas, Almanac of Liberty (Doubleday, Garden City, N.Y. 1954) p. 244.

[5] *Ibid.*

[6] Douglas, *supra*, note 4, at 52. (The First American newspaper was the Boston *News Letter*, April 24, 1704; the second, the Boston *Gazette*, December 21, 1719; the third the *American Weekly Mercury* of Philadelphia, Dec. 22, 1719).

When James was released from jail, he was ordered by the Colonial Assembly to "no longer print the paper called the *New England Courant*."[7] To evade this decree, the paper was published for several months under the name of Benjamin Franklin, before personal differences split the brothers and took Benjamin to New York. The *New England Courant* was the first American newspaper to be critical of the colonial regime; and the regime acted quickly to suppress it.

The seditious libel trial of John Peter Zenger[8] held in New York in 1735 marked the first serious departure from the British approach in addressing the press, by establishing truth as a defense to seditious libel.

Upon the 1776 adoption of the Constitutions of Virginia, Pennsylvania and Maryland, sections were included granting freedom of the press.[9] Massachusetts and Delaware enacted similar clauses in their constitutions in 1780 and 1782 respectively.[10]

The Virginia resolution of independence written prior to the adoption of that State's constitution contains the following statement: "the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained by any despotick government."[11]

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[7] Douglas, *supra*, note 4, at 52.

[8] 17 Howells State Trials 675 (1735).

[9] Rutland, The Birth of the Bill of Rights, 1776-1794, 78.

[10] *Ibid.*

[11] Virginia Declaration of Rights adopted June 12, 1776.

After the Revolution and the adoption of the Bill of Rights in 1789, the press remained essentially in its same form until the Nineteenth century, and, in fact, until after the War of 1812. Then, however, as the country began to expand westward and as small centers of population developed, the political press of the Nineteenth century came into being.

When we today begin to consider the criticism currently directed at the press for its extensive coverage of public figures in both their public and personal lives, we must recognize that these are but dim shadows of the public satire directed at Thomas Jefferson and his alleged mistress and progeny thereby; Andrew Jackson's pipe smoking, hillbilly wife; Abraham Lincoln's warty nose and supposed uncouth language; and Ulysses Grant's drunkenness, to cite only a few examples. Put mildly, the political press of the Nineteenth century was colorful, vigorous, hard-hitting and highly prejudiced, yet free, ungagged and uncensored.

Where were the lawsuits? We would respectfully suggest to the Court that it was not until the emergence of certain union trials in the Twentieth century, evolving out of the Espionage Acts during and immediately subsequent to World War I, that we began really to involve ourselves in questions of free speech and free press.

It wasn't until *Near* v. *Minnesota* [12] in 1930 that a great prior restraint case came on the scene. Who did this involve; a racially prejudiced scandal monger in the Midwest.

Once again, we must remember that our country has grown from its original population of slightly in ex-

[12] 283 U.S. 697 (1930).

cess of 2,800,000 at the time of the Revolution to more than 215,000,000 today. The speed of communication and immediate access to events has pressured a flood of information into the public arena such as has never been seen before.

All of these things tend to make one more conscious of the impact of the press. Yet who can truly judge its impact, and what studies show that it has impacted on juries so as to influence the judgment of intelligent persons in their addressing the facts of a given criminal case?

Following now, we address ourselves to the specific questions raised by the petitioners in their petition and brief and update the Court as to our views on the most recent cases since 1967 and, in so doing, call specifically to your attention words uttered by the late, great Justice Louis D. Brandeis:

> "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." [13]

and words from Winston Churchill:

[13] *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting).

> "A free press is the unsleeping guardian of every other right that freemen prize; it is the most dangerous foe of tyranny . . . Under dictatorship the press is bound to languish, and the loudspeaker and the film to become more important. But where free institutions are indigenous to the soil and men have the habit of liberty, the press will continue to be the Fourth Estate, the vigilant guardian of the rights of the ordinary citizen.[14]

and again, words from the late Justice Felix Frankfurter:

> "A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other; both are indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press." [15]

All to the effect, in final essence, that no steps should be taken to reduce the ability of the press to report in timely fashion to the public which it represents, those human events no matter how sad, perverted, or brutal, so that the public may be better informed as to how to deal with such events in the future.

As the late great Judge Learned Hand said:

> The first amendment ". . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be folly; but we have staked upon it our all." [16]

[14] Speech delivered March 5, 1946, at Fulton, Missouri.

[15] *Pennekamp* v. *Florida*, 328 U.S. 331, 355 (1946) (Frankfurter, J., concurring).

THE PRESS MAY NOT BE PROHIBITED FROM PUBLISHING INFORMATION REVEALED IN PUBLIC COURT PROCEEDINGS OR RECORDS CONCERNING PENDING JUDICIAL PROCEEDINGS

The very statement of the issue, as to whether an injunction may issue prohibiting publication by the press of information revealed in *public* court proceedings and *public* records about pending judicial proceedings, answers itself. For what else is the press than the public's representative for the receipt and transmission of information? As indicated previously, ANPA believes that the primary function of newspapers is the gathering of information for dissemination to the public. The drafters and supporters of the First Amendment firmly believed that it was imperative to the operation of the Republic which they envisioned that the people be informed as to the operations of government, including the judicial branch thereof. To that end they provided that no law should be made which abridged the freedom of the press, recognizing that only a free press could effectively keep the public so informed.

The First Amendment provides to the press an absolute guarantee of freedom to publish any and all information without prior restraint; similarly, it serves as a guarantee to the people of our nation that they will have such information available to them in timely fashion, "information to which the public is entitled in virtue of the constitutional guaranties."

[16] *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S.D. N.Y. 1943), *aff'd.*, 326 U.S. 1 (1945).

Grosjean v. *American Press Co.*, 297 U.S. 233 (1935). In colonial times, and even more so in today's world, no individual could discover and learn all that goes on about him, even if limited to only events of great significance. Therefore, the press was accorded the responsibility, along with the freedom to accomplish the task, of gathering and disseminating information which might be of interest and importance to the public.

It has never been held that, in carrying out this responsibility, the press has any lesser right than the public to seek out information and report its discoveries. In *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), this Court recognized that news gathering qualified for First Amendment protection, for "without some protection for seeking out the news, freedom of the press could be eviscerated." 408 U.S. at 707. Moreover, "the First and Fourteenth Amendments also protect the right of the public to receive such information and ideas as are published." *Pell* v. *Procunier*, 417 U.S. 817 at 832 (1974), *citing*, *Kleindienst* v. *Mandel*, 408 U.S. 753, 762-63 (1972); *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969). In *Pell* v. *Procunier*, *supra*, this Court did uphold prison regulations which restricted *access* of the press to prisoners for the purposes of conducting interviews, but the Court was careful to note that the regulations did "not deny the press access to sources of information available to members of the general public." 417 U.S. at 835.

With respect to court proceedings and court records, this Court has made it quite clear that the press has a right, and responsibility, to publish the information contained therein:

> Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions for the publication of truthful information contained in official court records open to public inspection.

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469, 43 L.Ed. 2d 328, 349-50 (1975). In *Estes* v. *Texas*, while overturning the petitioner's conviction on the grounds that televising his trial had resulted in a denial of due process, this Court reiterated its oft-stated position that the press may not be subjected to any sanction for reporting or commenting on that which takes place in a trial:

> [Reporters] are plainly free to report whatever occurs in open court through their respective media. This was settled in Bridges v. California, 314 U.S. 252 (1941), and Pennekamp v. Florida, 328 U.S. 331 (1946), which we reaffirm.

381 U.S. 532, 542 (1965).

This Court has had occasion to overturn criminal convictions based on its conclusions that press coverage, *among other factors*, had prevented the defendants from receiving "fair" trials. *See, e.g., Sheppard* v. *Maxwell*, 384 U.S. 333 (1964) ("carnival atmosphere"); *Irvin* v. *Dowd*, 366 U.S. 717 (1961) ("inherent prejudice"); *but see, Murphy* v. *Florida*, ——

U.S. ——, 44 L.Ed. 2d 589 (1975) (press coverage alone not sufficient to raise presumption of denial of due process). In none of the cases in this category, however, has the Court stated or even implied that it would be proper to prohibit the press from reporting on pretrial or trial proceedings or from reporting information concerning the crime or the accused.

> The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government.

Cox Broadcasting Corp. v. *Cohn,* 420 U.S. 469, 43 L.Ed. 2d 328, 348 (1975).

All of the foregoing would seem to leave no doubt as to the invalidity of the decision of the Supreme Court of Nebraska insofar as it upholds the order of the District Court regarding publication of information revealed in the court proceedings and records. Part of the arraignment hearing and all of the preliminary hearing of Simants were open to the press and the public; yet the District Court's "gag" order, as modified by the Supreme Court of Nebraska, attempts to prohibit the publication by the press and dissemination by the press or public of certain information revealed in the evidence and testimony presented at those hearings.

ANPA contends that the only standards applicable to court proceedings of any nature, whether pretrial or post-trial, are the normal standards of courtroom decorum requiring the appropriate maintenance of good order and discipline in the conduct of these matters for the benefit of all. Thus, neither the public nor

the press, its representative, can or should be denied the First Amendment right to publish whatever has taken place in such proceedings. The publication of "certain facts that strongly implicate an accused" may have some prejudicial effect on the community. Such "facts," however, frequently are not nearly as destructive of an atmosphere of impartiality as are the rumors and/or misstatement of facts spread through the community whenever a sensational event occurs.

This Court often has recognized the role which the press can serve as the "handmaiden of effective judicial administration," and as a guarantor of the fairness of trials. It was not only in recognition of the freedom of the press, but also in recognition of the valuable service rendered by the press in attempting to accurately convey to the public that which is occurring, that this Court in *Sheppard* v. *Maxwell, supra,* suggested the numerous alternatives open to a court to alleviate the effects of possibly prejudicial activities surrounding the trial of a criminal defendant, and refused to consider the imposition of any prior restraint on publication by the press.

Standards adopted by this Court in the past relating to contempt as a subsequent punishment for asserted improprietous publications are not and should not be the standards laid down for the publication of matters arising in the open court or any proceedings attached thereto. The only standard that should apply to this type of publication is the standard clearly set forth by the First Amendment itself.

To hold otherwise would be to deny to the people their right to be informed in a timely way as to the

operations of their government and would pose a serious and imminent threat to the First Amendment's guarantee to our people of a free press. As stated by Mr. Justice Douglas in *Craig* v. *Harney*, 331 U.S. 367, 374 (1947):

> "A trial is a public event. What transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."

No Direct Prior Restraint May Be Imposed, Consistently With the First and Fourteenth Amendments to the Constitution, Upon the Publication By the Press of Information Which Does Not Relate to the National Security and Which Could Not Result In Direct, Immediate and Irreparable Damage to the Nation Or Its People.

It is the position of ANPA that the judicial restrictive order issued by Respondent in the trial of Erwin Charles Simants in the District Court of Lincoln County, Nebraska and supported in part by the Supreme Court of Nebraska and, upon application to this Court for a stay, by Justice Blackmun, is in direct conflict with the long line of cases in this Court which establish the constitutional prohibition on prior restraints on the freedom of the press. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Bridges* v. *California*, 314 U.S. 252 (1941); *Near* v. *Minnesota*, 283 U.S. 697 (1930). There is no doubt but that "previous restraints on the publication of information come before the courts with a heavy presumption of invalidity." *New York Times Co.* v. *United States*, *supra*, at 714. This Court has long affirmed the concept that our constitutional freedom of speech and of the press primarily consists of permitting no prior restraints on the right to speak or publish. This Court has noted: "In the first place, the main purpose of such constitutional provisions is to prevent all such previous restraints upon publications as had been practiced by other governments. . . ." *Patterson* v. *Colorado*, 205 U.S. 454, 462 (1907).

With the exception of publications during time of war which threaten national security, *see*, *Schenck* v. *United States*, 249 U.S. 47 (1919), this Court has never upheld the imposition of prior restraints upon publications, otherwise constitutionally protected. In the context of *subsequent* punishment of press publication which may impair the orderly administration of justice, it has been held that the "substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Bridges* v. *California*, 314 U.S. 262, 263 (1941). Nevertheless, even in those cases involving subsequent punishment of the press, this Court has refused to hold that the publications involved posed a "serious and imminent threat to the administration of justice." *Craig* v. *Harney*, 331 U.S. 367, 372 (1947). Although the above standards may be appropriate in cases which involve subsequent punishment, they cannot be held to authorize the imposition of a prior restraint on publications, the content of which is not yet known, for "the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may

result." *New York Times Co.* v. *United States,* 403 U.S. 713, at 725-26 (1971) (Brennan J. concurring; footnote omitted).

It is in this regard, fortunately, that the American system of protecting a criminal defendant's right to trial before an impartial jury differs from the English system. Under the English system of contempt, judges summarily punish for contempt of court newsmen responsible for publishing either evidence or comment on any matter inadmissible at trial—that is, material such as prior confessions of the defendent; past criminal records; comment relating to past misbehavior or moral conduct; comment ridiculing the accused's character; and any expression of opinion concerning guilt or innocence in a pending trial. Although this shows a commendable regard for the rights of criminal defendants, it also works to substantially impair the freedom of the English press and the public's right to be informed as to the administration of justice. In a report on the British press, published by a political and economic planning group of civic and government leaders in 1938, the following significant comment was made:

> "One of the chief legal hindrances to the liberty of the Press is the uncertain nature of the offense of contempt of court, and the arbitrary judicial procedure in such cases. While it would evidently be undesirable to permit cases to be tried in the newspapers in advance of the trial, or to allow confidence in the quality of justice to be undermined by abuse or ridicule, there is no doubt that a great deal of reasonable criticism of the administration of justice is thereby discouraged." Political and Economic Planning Group, *A Report on The British Press* (1938), p.212.

Moreover, this Court, in commenting on the English common law power of judges to punish by contempt out-of-court publications tending to obstruct the fair administration of justice in a pending trial, noted that "[w]e cannot start with the assumption that . . . to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases." *Bridges* v. *California, supra,* at 271. Therefore, "the First Amendment cannot reasonably be taken as approving prevalent English practices," and press freedom, in this context, must be given "the broadest scope that could be countenanced in an orderly society." *Id.* at 265.

An additional danger to the freedom of the press is posed, we respectfully submit, by the fact that it is extremely difficult, if not impossible, to determine before publication whether, in a given criminal proceeding, publication of confessions, admissions against interest, or other information strongly implicative of the accused, actually will deny a defendant his Sixth Amendment right to trial before an impartial jury. Admittedly, irresponsible publication of the kinds of information covered by Respondent's "gag" order may raise certain preconceived notions on the part of prospective jurors as to the guilt or innocence of the accused. However,

> "to hold that the mere existence of any preconceived notion as to the innocence or guilt of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality, would be to establish an impossible standard."

Irvin v. *Dowd,* 366 U.S. 717, 723 (1961)

The issue, therefore, is whether publication of the sort herein proscribed will create prejudicial impressions in the minds of veniremen which "may fairly be presumed to yield to the testimony offered" or whether it will create partiality "which close[s] the mind against the testimony that may be offered in opposition to it." *United States* v. *Burr*, 25 Fed. Cas. 49, 51 (1807).

The mere fact that a jury may be generally aware of facts strongly implicative of the defendant, or even specifically aware of the fact that the defendant made a self-incriminating statement, does not deny to that defendant his Sixth Amendment rights. The practice of excluding the jury during a preliminary examination as to the admissibility of a confession remains within the discretion of the trial judge in some jurisdictions, and in no cases that your amicus has been able to find has it been elevated to the status of a constitutional right. Moreover, if it were true that mere public knowledge of a confession or of a defendant's past criminal record would prevent a subsequent fair trial, "after a verdict had been reversed on appeal, for the improper admission of a confession, the case could not be retried." *Baltimore Radio Show* v. *Maryland*, 67 A.2d 497 (1949), *cert. denied*, 388 U.S. 912 (1950).

This Court has held on various occasions that the mere fact that jurymen had read news accounts that were prejudicial and implicative of the defendant was not sufficient to warrant reversal on due process grounds. *Murphy* v. *Florida*, —— U.S. ——, 44 L.Ed.2 589 (1975); *Beck* v. *Washington*, 369 U.S. 541 (1962); *Stroble* v. *California*, 343 U.S. 181 (1952); *U.S. ex rel. Darcy* v. *Handy*, 351 U.S. 454 (1956); *Buchalter* v.

New York, 319 U.S. 427 (1943); *Holt* v. *United States*, 218 U.S. 245 (1910); *Thiede* v. *Utah*, 159 U.S. 510 (1895); *Ex Parte Spies*, 123 U.S. 131 (1887); *Hopt* v. *Utah*, 120 U.S. 430 (1886).

Furthermore there is nothing in the factual record of this case which would indicate that the local press had created, or would create, a climate of public opinion so inflamed as to constitute "inherent prejudice" to the defendant's right to a "fair" trial. *See, Irvin* v. *Dowd*, 366 U.S. 717 (1961); *Moore* v. *Dempsey*, 261 U.S. 87 (1923). Nor is the fact situation herein analogous to that in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), where this Court reversed a state court conviction primarily on the grounds that the trial judge allowed a "circus atmosphere" to prevail in the courtroom by not properly governing the use of the courtroom by newsmen, and by not controlling the release of information to the press by officers of the court. *Id.*, at 358, 359, 361. And indeed, the *Sheppard* opinion specifically declined to "place any direct limitations on the freedom traditionally exercised by the news media." *Id.*, at 350.

Finally, we are compelled to draw this Court's attention to the failure of both the Respondent and the Supreme Court of the State of Nebraska to adopt, or to adequately justify their failure to adopt, available alternative procedural safeguards. Inasmuch as change of venue, change of venire, continuance, or voir dire may be employed to overcome whatever prejudicial effects may be engendered by the constitutionally protected right to publish, prior restraint on the freedom of the press is "both unwise as a matter of policy and poses serious constitutional problems." Report of the Committee on the Operation of the Jury System on

the "Free Press-Fair Trial" Issue, (Kaufman Report) 45 F.R.D. 391, at 401-402 (1969). *See also, Sheppard* v. *Maxwell,* 384 U.S. 333 (1966); *U.S. ex rel Darcy* v. *Hardy,* 351 U.S. 454, 463 (1956); *Stroble* v. *California,* 343 U.S. 181, 193 (1952); *Shepherd* v. *Florida,* 341 U.S. 50, 52 (1951); *Stroud* v. *United States,* 251 U.S. 15 (1919); *A.B.A. Advisory Committee on Fair Trial and Free Press, Standards Relating to Fair Trial and Free Press,* (Reardon Report), Sec. 4.1 (1968); *Freedom of the Press and Fair Trial: Final Report with Recommendations by the Special Committee on Radio, Television and the Administration of Justice of the Association of the Bar of the City of New York* (Columbia University Press, 1967).

It therefore is respectfully submitted that the order of the District Court of Lincoln County, Nebraska, presents to this Court a serious violation of the constitutional guarantee of a free press. In view of the court's inability, before the fact of publication, to adequately assess the prejudicial effects, in terms of impermissible juror prejudice, that publicity might produce in this case; and in view of the availability of alternative procedural safeguards, "the press cannot be sanctioned for publishing . . . . In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast." *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 43 L.Ed.2d 328, 350 (1975).

If the guarantees of the Sixth Amendment to criminal defendants are permitted to prevail over the rights of the people to a free press in such a manner, the delicate balance among the guarantees of the Bill of Rights will be seriously threatened, and the protections of the First Amendment, particularly its role as

the monitoring "handmaiden of effective judicial administration," *Sheppard* v. *Maxwell supra* at 350, will be left to the whims of potentially censorious judges.

CONCLUSION

ANPA respectfully suggests and represents to this Court that no discussion here is necessary as to Question Three presented by the Petitioner's brief, simply because it is so clear that this case presents an undeniable application of the First and Fourteenth Amendments to the Constitution to the improprietous granting of "gag" orders by the District Court of Lincoln County, Nebraska, and the injunction of the Nebraska Supreme Court dated December 1, 1975, applying a prior restraint on the right of the Petitioners to publish.

Accordingly, we respectfully represent to the Court, in light of all the foregoing, that it should reverse and remand with directions to vacate such orders and, in so doing, this Court should establish a rule of law which will for the foreseeable future lay to rest this subject in the minds of the free people of our democratic country.

Respectfully submitted,

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APPENDIX

APPENDIX A

ANPA SPECIAL COMMITTEE ON FREE PRESS AND FAIR TRIAL

Chairman:

D. Tennant Bryan, *Publisher,* Richmond (Va.) Times-Dispatch and News Leader.

Members:

Otis Chandler, *Publisher,* Los Angeles (Calif.) Times;
Jack R. Howard, *President,* Scripps-Howard Newspapers, New York City, N.Y.;
W. D. Maxwell, *First Vice President and Editor,* Chicago (Ill.) Tribune;
Paul Miller, *President,* Gannett Newspapers, Rochester, N.Y.;
Benjamin M. McKelway, *Vice President and Editorial Chairman,* Washington (D. C.) Star;
Sam Ragan, *Executive News Editor,* Raleigh (N. C.) News & Observer and Raleigh Times;
Vermont C. Royster, *Editor,* Wall Street Journal, New York City, N. Y.;
Arthur Ochs Sulzberger, *President and Publisher,* New York (N. Y.) Times;
Robert L. Taylor, *President and Publisher,* Philadelphia (Pa.) Bulletin;
Louis A. Weil, Jr., *Publisher and Editor,* Lansing (Mich.) State Journal;
Robert M. White, II, *President and Editor,* Mexico (Mo.) Ledger.

Counsel:

Arthur B. Hanson, *General Counsel,* American Newspaper Publishers Association;
William J. Butler, Jr., *Associate Counsel,* Hanson, Cobb, O'Brien, & Tucker, Washington D. C.

FOREWORD

This report of the American Newspaper Publishers Association was prepared by a Special Committee of distinguished newspaper executives appointed February 3, 1965 to make a thorough study of the relationship between a free press and fair trial. The Committee submits this report as a contribution from daily newspapers to the public discussion of this important subject.

The twelve-man ANPA Committee on Free Press and Fair Trial includes owners of daily newspapers and other senior executives with policy-making authority. This report has been approved by the ANPA Board of Directors which authorized appointment of the Committee. The appointments were made by Gene Robb, publisher of the Albany (N. Y.) Times-Union and Knickerbocker News, who was then President of ANPA. He was succeeded in April 1966 as ANPA President by J. Howard Wood, publisher of the Chicago Tribune.

In announcing formation of the Committee, Mr. Robb said:

> "The public interest is paramount in any consideration of these two constitutional guarantees—a free press under the First Amendment and a fair trial under the Sixth Amendment. These few instances where they appear to be in conflict should be resolved without any loss of our liberties. Indeed the studies now embarked upon concerning the relationships of a fair trial and free press in the administration of justice ought to help preserve and strengthen both. That is our purpose."

The Committee has taken that statement as its charge.

The Committee has worked for nearly two years reviewing the continuing dialogue among members of the Bench, Bar, Press and Law Enforcement officials. It has met alone and jointly with the American Bar Association Advisory

Committee on Fair Trial and Free Press. The Committee has reviewed legal documents, speeches and writing from many sources.

It should be noted that this study is offered independent of the report of the American Bar Association's Advisory Committee on Fair Trial-Free Press, issued in late September 1966. At that time the ANPA report was already in final preparation. Like the ABA Committee, the ANPA offers its findings and its views for the continuing public discussion.

Early in its deliberations, the ANPA Committee concluded that it needed a major legal study including the pertinent case law under United States jurisprudence; a historical review of the first ten Amendments to the U.S. Constitution, making up the "Bill of Rights," and comparisons, where applicable, of the systems in the United States and Great Britain. The Committee charged the ANPA General Counsel and his associates with preparation of those studies which appear as appendices to this report.

In reviewing the results of its own studies and those of others, the Committee has adhered to a fundamental position that the rights discussed in its report belong to all the citizens of the United States. The Press shares with the Bench, Bar and Law Enforcement officials the responsibility for the preservation of the rights of all citizens under our form of government.

In the much discussed Sheppard Case, the United States Supreme Court stated on June 6, 1966:

> "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public

scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media, for what transpires in the court room is public property."

The press recognizes its responsibility.

The ANPA offers this document as a contribution to the preservation and strengthening of these two fundamental Constitutional guarantees—a free press under the First Amendment and a speedy and public trial by an impartial jury under the Sixth Amendment.

STANFORD SMITH,
General Manager.

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION
750 Third Avenue,
New York, N. Y. 10017

January 5, 1967

CONSTITUTIONAL AMENDMENTS INVOLVED

Article I.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Article VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining

witness in his favor, and to have the Assistance of Counsel for his defence."

Article XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FREE PRESS AND FAIR TRIAL

REPORT OF A SPECIAL COMMITTEE OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

The American Newspaper Publishers Association has devoted nearly two years to a study of a Free Press and Fair Trial and from this major research project have come certain conclusions. Among them are:

- There is no real conflict between the First Amendment guaranteeing a free press and the Sixth Amendment which guarantees a speedy and public trial, by an impartial jury.
- The presumption of some members of the Bar that pretrial news is intrinsically prejudicial is based on conjecture and not on fact.
- To fulfill its function, a free press requires not only freedom to print without prior restraint but also free and uninhibited access to information that should be public.
- There are grave inherent dangers to the public in the restriction or censorship at the source of news, among them secret arrest and ultimately secret trial.
- The press is a positive influence in assuring fair trial.

- The press has a responsibility to allay public fears and dispel rumors by the disclosure of fact.
- No rare and isolated case should serve as cause for censorship and violation of constitutional guarantees.
- Rules of court and other orders which restrict the release of information by law enforcement officers are an unwarranted judicial invasion of the executive branch of government.
- There can be no codes or covenants which compromise the principles of the Constitution.
- The people's right to a free press which inherently embodies the right of the people to know is one of our most fundamental rights, and neither the press nor the Bar has the right to sit down and bargain it away.

This last conclusion is central to all the others, pointed and pertinent though they be to the matter involved. The inescapable conclusion is that the press must be ever vigilant in its opposition to anything that threatens Freedom of the Press.

Interrelation of First and Sixth Amendments

The extensive studies of the Committee which are documented in the Appendices delve into the American historical experience to show that the First and Sixth Amendments to the Constitution are not incompatible but mutally supportive. Indeed, there can be no fair trial without a free press, and without fair trial no freedoms can exist.

The American press remains as devoted to the principles of fair trial as it is to a free press, and its insistence that justice be neither clouded nor cloaked in secrecy at any stage is to assure that those principles are maintained.

The characteristic that most distinguishes democracy from totalitarianism is that the means are as important as the end. It is not enough for the people merely to know

the end result of a trial, they need to know the means to that end. Justice cannot be served by secrecy nor can a Free Press serve in secrecy.

It is obvious that the First and Sixth Amendments are so interrelated and so dependent, one upon the other, that modification or dilution of either on the fallacious premise that such action would strengthen the other would, itself, represent a betrayal of the intent of the framers of the Constitution.

There is no conflict between a free press and a fair trial, and those who seek to sway the public with such a contention do a disservice to the people and to the cause of American Freedom.

Some segments of the American Bar appear to have begun their discussions of the Free Press-Fair Trial question with the assumption that pre-trial reporting of facts in criminal matters is itself prejudicial to a defendant. This is a presumption for which no concrete proof is advanced. There are cases cited, of course, in which it is *believed* that a defendant's rights are imperiled by "pre-trial publicity." But this is simply a conjecture—and not a fact. Indeed, in bringing such charges of prejudice in pre-trial reporting, the Bar is not only indicting but convicting without clear evidence that such is true.

In fact, cases cited in Appendix "B" tend to show that pre-trial and in-trial reporting in criminal matters have no real bearing on the outcome of such cases. The only thing pre-trial news endangers is ignorance.

During the course of this Committee's study many jurists made comments which are pertinent to this point.

Judge W. Orvyl Schalick of New Jersey said: "The mere fact that people are informed cannot be construed to mean that they cannot make a fair and impartial determination of the guilt or innocence of anyone accused of a crime."

From Federal Judge Frank W. Wilson of Chattanooga, Tennessee, came these words: "History has taught us that if the public is to know, the press must be free to report. If it is to be free, it must be free to fail as well as to succeed, to err as well as to be correct. Even if the press errs with respect to reporting upon criminal proceedings, that its effect is so prejudicial to the right of a fair trial or that it renders so difficult the job of selecting an impartial jury can be doubted."

Judge Harold R. Medina, of the U. S. Court of Appeals for the Second Circuit and Chairman of the Fair Trial Committee of the Association of the Bar of the City of New York, recently stated for his committee that the Constitutional "guarantee of free speech and free press, and the critical importance of the concept of freedom of communication that underlines this guarantee, preclude, on both constitutional and policy grounds, direct controls of the news media by a governmental scheme of legislative or judicial regulation." He said his committee report, expected in January, 1967, will concentrate on "the steps that we think should be taken by the judicial establishment to put its own house in order."

There should be no assumption that an objective juror must be an ignorant juror, and it is not only a faulty but a dangerous assumption that an over-riding prejudice comes from printed truth. To assume such would be to consign a community to a sterility of information. The public must have the right to make informed judgments about crime in a community, about its law enforcement and its courts. This cannot be done if there is a denial of information which the people need to make such judgments.

It is evident that a speedy and public trial, by an impartial jury guaranteed by the Sixth Amendment can be assured only so long as there is a free press. Such a press assures through scrutiny that the defendant is fairly tried.

On numerous occasions the press has ferreted out the necessary evidence to prove a defendant's innocence. Often, too, the right of citizens has been protected by newspaper disclosure of improper methods used by police in arrest and investigation. These safeguards for defendants cannot be assured if the freedom of the press established by the Constitution is replaced by censorship or restrictions upon full reporting.

It is quite clear that freedom of the press means the right to gather, to print, and to circulate information. Any judicial restraint of that right at any point constitutes a prior governmental restraint on publication. It is, in fact, censorship at the source when judges, by court order, prohibit law enforcement officers of the public from providing information to the public. Such an order came in September of 1966 in Wake County, North Carolina, when two judges issued an order without any statutory authorization that restricted police from revealing anything more than the name of an accused, his address, and the charge against him. Such restrictions are unfair to the public, the police, and the accused. For if the police are not required by public record and public warrant to give an accurate accounting of the arrest of a citizen then the country is well on the road to a police state. It must be remembered that technical criminal charges often, absent counsel, apprise neither the accused nor the public of the crime alleged.

Newspapers, of course, should not abuse their right to publish without prior restraint. Nor should they shirk their responsibilities. In the pursuit of truth, it is well to recall the words of English editor C. P. Scott of some years ago. In pointing out that the primary office of a newspaper is the gathering of news, he said: "At the peril of its soul it must see that the supply is not tainted. Neither in what it gives, nor in what it does not give, nor in the mode of presentation, must the unclouded face of truth suffer wrong. Comment is free but facts are sacred."

Secrecy at the source endangers justice and the general welfare of the public. Thus it is evident that there can be no agreement by the American Press that would even indicate acceptance of any imposition of rules or restrictions upon law enforcement officers which would have the effect of curtailing access by newspapers to truthful information in police or public records pertaining to the commission of crime in any community.

Unrestricted Press

In the reporting of crime news the press cannot submit to any restrictions which would deprive the accused, as well as the public, of the right to full and unfettered dissemination of the truth. As the eyes and ears of the public, the newspaper is, in truth, a watchdog. In the free functioning of its responsibility, it is the duty of the press to see that a defendant is properly treated and fairly tried. To assume that alleged abuses in the treatment of crime news are always to the detriment of the accused is a false assumption and history proves as much, as demonstrated in Appendices "A," "B," "D," and "E."

The benefits to an accused of full news coverage of arrests and trials were well stated by Senator Sam Ervin of North Carolina during joint hearings in August, 1965, of the Senate Subcommittees on Constitutional Rights and Judicial Administration. Such news coverage, Senator Ervin declared, is the best protection against secret arrest and trial. Thus a defendant in a criminal case should not be denied the right to present to the public any statement with respect to a criminal charge against him. Publication of such news serves the accused in that it often brings forth witnesses in his behalf.

It is pertinent at this point to cite the words of the third man in the Free Press-Fair Trial discussion. That man is the defendant himself, and here are the words of a convict, Hugh Dillion, writing in the Southern Michigan prison

publication. "As distasteful as adverse publicity may be," he said, 'it is better to be spotlighted momentarily than abused in darkness."

Both public order and protection of the accused are served by the bright light of truth. When the people are denied information about criminal charges, the denial provides a breeding ground for rumor. For while newspapers may be denied access to information of public concern, the word of crime will circulate. If there is no reliable source of information, such as an authentic news story, rumor and exaggeration can unduly excite and arouse the public. Without a calm appraisal of the truth, the public might well react in fear and terror, as it has on occasion in the past, with a breakdown of law and order as the result. Rumor which promotes exaggeration and distortion is unjust to the accused because it could easily encourage a fear-inflamed people to take the law into their own hands.

Newspapers cannot agree to restrictions which would force them to abdicate or even hamper their responsibility to the public to put fact before rumor. The public interest will be best served by fair and accurate crime news coverage which helps protect the public and the accused from the dangers stemming from excesses in the past on the part of some lawyers and some segments of the press.

Moreover, it is imperative that the public be informed of facts about crime if law enforcement agencies and courts are to enjoy the confidence and respect of the public. As in all functions of government, the proper administration of justice is ultimately up to the people, and it is the responsible press which provides the facts on which an informed public can make judgments and act intelligently.

Crime News Reporting Vital

In a study covering a ten-year period from 1955 it was shown that American newspapers devoted only three per

cent of their space to crime news. In that same period of time, the crime rate in America increased by 73 per cent. This increase in crime is of real and vital concern to the law-abiding citizens of the country, and this concern cannot be eased by concealment but only by the bright glare of truth in reporting. Indeed, there is ample evidence that publicity is a deterrent to crime while concealment fosters its growth. Thus, rather than the curtailing of crime news reporting, it would indeed seem that more such reporting is needed in a day when crime is increasing by alarming proportions.

Just as only a small minority of criminal cases—less than 10 per cent—ever reach the jury stage, an even smaller minority of crime reports reaches public print. A survey in New York City in January, 1965, showed that of 11,724 felonies committed only 41 of those were even mentioned in the one newspaper that pays more attention than others to crime news. As to the effect of pre-trial reporting of crime news, a study covering the period of January 25, 1963, to February 11, 1965, resulted in an estimate that in the entire country there were slightly more than 40,000 jury trials of felony cases in that period. In only 101 of these 40,000 cases was the question of prejudice raised, and in only 51 cases did attorneys for either side raise the question of prejudice resulting from news reports. Out of these 51 cases, there were only five in which relief was granted. One new trial was ordered, but no writ of relief was granted on the argument that publication of news made a fair trial impossible. In three of the five cases the rulings pertained to such things as the error by a judge who permitted jurors to read newspapers during the trial, the failure of another judge to act on expressions of prior prejudice of jurors, and denial of a motion by a third judge to order a change of venue because of presumed prejudice in the community. Only in two of the cases were the grounds for reversal based on presumed juror prejudice because of news reports.

Even granted that in rare and isolated cases pre-trial reporting may be a factor in creating an over-riding prejudice in potential jurors, there are procedural remedies present to provide effective safeguards. Such procedural safeguards include change of venue, change of venire, continuance, severance, voir dire, blue ribbon juries, isolation of the jury, instructions, retrial, appeal and habeas corpus. Our studies indicate that these remedies are fully adequate to protect the rights of a defendant.

The Sheppard Case

All of these remedies for the extremely rare case of possible prejudice from "publicity" are advanced in the U.S. Supreme Court's decision on June 6, 1966, in the Sheppard case. It should be pointed out, however, that here the court was dealing with the unusual and not typical case, and the majority opinion, eight to one, makes it clear that the court's words are meant to apply to what the trial judge in the Sheppard case should have done, not what every judge should do in every case. It is obvious that there is no mandate in the Sheppard case for judges across the land.

In regard to the Sheppard case the words of Judge George Edwards of the U.S. Court of Appeals for the Sixth Circuit in a recent statement constitute a pertinent warning to those who are reacting with restrictions in the wake of the Supreme Court's decision. Judge Edwards said:

> "... no judge who participated in review of that case advocated the strictures which are currently being contemplated. Justice Clark's opinion for the United States Supreme Court did *not* rule that Dr. Sheppard was denied due process because of pretrial publicity. His opinion did *not* call for sanctions against a free press. His opinion did *not* suggest silencing lawyers for months or years prior to a criminal trial."

Judge Edwards continued:

> "Our forefathers elected to put freedom of speech and press first among the amendments which constitute the Bill of Rights. From the concept of freedom of speech and press and criticism and debate has come most of the inventiveness, richness and power of our present society. In my judgment, however, we do not have to choose between compulsory limitations on freedom of speech and press and a fair trial. The judiciary of our country can use the well-known tools for protection of fair trials which have been produced by our legal history."

As Mr. Justice Clark stated for the Court in the Sheppard case:

> "A responsible press has always been regarded as the handmaiden of efficient judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitation on the freedom traditionally exercised by the news media, for what transpires in the court room is public property."

Judicial Restrictions Not Warranted

Yet the point which still must be made is that the American public's right to a free press should not be jeopardized by judges attempting to impose restrictions on all criminal matters because of the rare and isolated case.

To this Committee it is inconceivable that such drastic restrictions as censorship at the source of news should be imposed upon the entire American democratic system because of possible prejudice in a rare case.

The Committee states that it is a matter of public concern when court orders place restrictions on law enforcement officers in the release of information. Such action could easily lead to judicial domination of the executive branch of government, and may well be an invasion which would threaten the historically honored separation of powers and responsibilities.

The public has the right to know the public's business, and there is no area of public action more vital to the people than the action of their police. Any restrictions on public disclosure of police action is inimical to the public interest.

The British System

During the course of this study there was a suggestion by some members of the Bar that the British system of contempt be adopted. As we all know, freedom of the press is guaranteed in the United States by virtue of the specific language of the First Amendment. In Great Britain, however, there is no written constitution embodying such a statement. The British system is based on judicial control and political restraint rather than a constitutional provision affirmed by judicial construction. There are no restraints whatsoever in Great Britain preventing the government from making laws, the effect of which might be to interfere with the operations of the press or any part of it.

With this summary in mind, it must be noted that in Great Britain the courts totally control and restrain the press as regards the reporting of crime news whether it be pre-trial, during trial or subsequent to trial, although in the latter event the control has been least used.

The British restrictions on reporting facts and circumstances surrounding criminal trials are not well defined. An editor who breaches these restrictions may be held in contempt of court and given a maximum punishment of life imprisonment or an unlimited fine, or both. One of the

great problems with this system is that in order to report any more than the minimal information such as the fact that a crime has been committed, it is necessary for the editor to guess what a judge would consider acceptable or admissible. The law of contempt has been judicially construed as different in this country. The British system is incompatible with ours .

Codes of Conduct Not Applicable

In the early stages of the study the most often recommended course for the press by the Bar was the adoption of codes of conduct. Such a course must be rejected. From a practical standpoint any such codes would be without value because there is no way to enforce them. An individual newspaper may set its own policy or guidelines; any application of specific conduct must remain the sole responsibility of the independent and individual newspaper.

It is well here, however, to quote again from the statement of Judge Wilson. In respect to such proposed codes, he said:

> "In the preparation and negotiations for such codes, the participants should always bear in mind that freedom of the press is not their exclusive right to bargain with. Freedom of the press is the right of the public to know, not merely the right of any particular publisher to report as he chooses. No publisher or group of publishers and no members of the bar or bar associations has the prerogative to bargain away the public's right to know."

Appropriate Courtroom Restrictions

This Committee recognizes the practicality at times of certain procedural restrictions regarding newsmen's activities within a courtroom. It recognizes that there are such things as limitations of space in the coverage of major news events or criminal trials of unusual public interest,

and that such solutions as pooling of reporters and photographers may be necessary. Such procedural guides have been accepted by major news organizations and are available if necessary.

In respect to suggested restrictions by Bar associations on their own members, this Committee feels that this is a matter of decision for the Bar itself.

Background of this Report

The background from which this Committee received its charge was the release of the Warren Commission Report on the assassination of John F. Kennedy. In that report the press of America was charged with "irresponsibility and lack of self-discipline." A review of the press performance in those dark days at Dallas shows that such criticism was unwarranted. In that crisis on November 22, 1963, the American press was called upon to carry out its responsibility to the people—to tell them not only what had happened, but how the country met the crisis. It was those facts provided by the American press that steadied a reeling nation and a shocked and startled world. The American Press should have been commended rather than censured for its performance.

But it was the Warren Commission Report which triggered the guns of attack on the press, and the cry that the free press is the enemy of fair trial was heard again. Our studies, our historical experience, our common sense, prove the opposite of this contention. They are not incompatible, but dependent one upon the other.

Conclusion

The American Press has demonstrated its devotion to the cause of fair trial as it has to the cause of a free press.

This Committee, therefore, cannot recommend any covenants of control or restrictions on the accurate reporting of

criminal matters, or anything that would impair such reporting.

The Committee does recommend that the press stand at any time ready to discuss these problems with any appropriate individuals or groups. Indeed, such positive action can be a far greater force for the cause of justice and the general welfare of the people than the negative force of restrictions on basic freedoms. But there can be no agreement on the part of the American Press to dilute its responsibility, or to circumvent the basic rights and provisions of the Constitution. To agree to any of these things would be a mockery of the guarantee made to the people of this Republic by its founding fathers.

The freedom of the press is a fundamental right and it cannot be abridged. The press shares with the Bench, Bar and Law Enforcement officials the responsibility for preservation of the American liberties embodied in the First and Sixth Amendments.

APPENDIX B

Madison's Proposals

"*First.* That there be prefixed to the Constitution a declaration, that all power is originally vested in, and consequently derived from the people.

"That Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.

"That the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.

"*Secondly.* That in Article 1st, section 2, clause 3, these words be struck out, to wit: 'The number of Representatives shall not exceed one for every thirty thousand, but each state shall have at least one Representative, and until such enumeration shall be made;' and in place thereof be inserted these words, to wit: 'After the first actual enumeration, there shall be one Representative for every thirty thousand, until the number amounts to ————, after which the proportion shall be so regulated by Congress that the number shall never be less than ————, nor more than ————, but each State shall, after the first enumeration, have at least two Representatives; and prior thereto.'

"*Thirdly.* That in Article 1st, section 6, clause 1, there be added to the end of the first sentence, these words, to wit: 'But no law varying the compensation last ascertained shall operate before the next ensuing election of Representatives.'

"*Fourthly.* That in Article 1st, section 9, between clauses 3 and 4, be inserted these clauses to wit: "The civil

rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or in any pretext, infringed.'

"The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.

"The people shall not be restrained from peaceable assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances.

"The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.

"No soldier shall in time of peace be quartered in any house without consent of the owner; or at any time, but in a manner warranted by law.

"No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

"The rights of people to be secured in their persons; their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported

by oath or affirmation, or not particularly describing places to be searched, or the persons or things to be seized.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the cause and nature of the accusations, to be confronted with his accusers, and the witnesses against him; to have a compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

"The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers or as inserted merely for greater caution.

"*Fifthly.* That in Article 1st, section 10, between clauses 1 and 2, be inserted this clause, to wit:

"No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.

"*Sixthly.* That in Article 3d, section 2, be annexed to the end of clause 2d, these words, to wit:

"But no appeal to such court shall be allowed where the value in controversy shall not amount to ..... dollars: nor shall any fact triable by jury, according to the course of common law, be otherwise re-examinable than may consist with the principles of common law.

"*Seventhly.* That in Article 3d, section 2, the third clause be struck out, and in its place be inserted the clauses following, to wit:

"The trial of all crimes (except in cases of impeachment, and cases arising in the land or naval forces, or the

militia when on actual service, in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorized in some other county of the same States, as near as may be to the seat of the offense.

'In cases of crimes committed not within any county, the trial may by law be in such county as the laws shall have prescribed. In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to maintain inviolate.'

"*Eighthly.* That immediately after Article 6th, be inserted as Article 7th, the clauses following, to wit:

'The powers delegated by this constitution are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial nor the executive the powers vested in the legislative or judicial, nor the judicial exercise the powers vested in the legislative or executive departments.

'The powers not delegated by this constitution, nor prohibited by it to the States, are reserved to the States respectively.'

"*Ninthly.* That Article 7th be numbered as Article 8th."

Proposals Made by House Committee

Proposal First. "In the introductory paragraph of the constitution, before the words 'We the people, add 'Government being intended for the benefit of the people, and

the rightful establishment thereof being derived from their authority alone.' "

Proposal Second. "Article 1. Section 2. Paragraph 3. Strike out all between the words 'direct' and 'and until such,' and instead thereof, insert 'after the first enumeration, there shall be one representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that the number of representatives shall never be less than one hundred, nor more than one hundred and seventy-five; but each State shall always have at least one representative.' "

Proposal Third. "Article 1. Section 6. Between the words 'United States,' and 'shall in all cases,' strike out 'they,' and insert 'but no law varying the compensation shall take effect, until an election of representatives shall have intervened. The members.' "

Proposal Fourth. "Article 1. Section 9. Between paragraphs two and three insert 'no religion shall be established by law, nor shall the equal rights of conscience be infringed.

" 'The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed.

" 'A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms.

" 'No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

" 'No person shall be subject, in case of impeachment, to more than one trial or one punishment for the same

offense, nor shall be compelled to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

" 'The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.

" 'The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people.' "

Proposal Fifth. "Article 1. Section 10. Between the first and second paragraph, insert, 'No State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor the right to trial by jury in criminal cases.' "

Proposal Sixth. "Article 3. Section 2. Add to the second paragraph, 'But no appeal to such court shall be allowed, where the value in controversy shall not amount to one thousand dollars; nor shall any fact, triable by a jury according to the course of common law, be otherwise re-examinable than according to the rules of common law.' "

Proposal Seventh. "Article 3. Section 2. Strike out the whole of the third paragraph, and insert, 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

" 'The trial of all crimes (except in cases of impeachment, and in cases arising in the land and naval forces, or in the militia when in actual service in the time of war, or public danger,) shall be by an impartial jury of free-

holders of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment, or indictment, by a grand jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place within the same State; and if committed in a place not within the State, the indictment and trial may be at such place or places as the law may have directed.

" 'In suits at common law, the right of trial by jury shall be preserved.' "

Proposal Eighth. "Immediately after Article 6, the following to be inserted as Article 7: "The powers delegated by this constitution to the Government of the United States, shall be exercised as therein appropriated, so that the Legislative shall not exercise the powers vested in the Executive or Judicial; nor the Executive the powers vested in the Legislative or Judicial; nor the Judicial the powers vested in the Legislative or Executive.' "

Proposal Ninth. "The powers not delegated by the Constitution, nor prohibited by it to the States, are reserved to the States respectively."

Proposal Tenth. "Article 7 to be made Article 8."

Proposals Sent from House to Senate

"*Article I.* After the enumeration, required by the first article of the constitution, there shall be one representative for every thirty-thousand, until the number shall amount to one hundred; after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred representatives, nor less than one representative for every forty thousand persons, until the number of representatives shall amount to two hundred; after

which the proportion shall be so regulated by Congress, that there shall not be less than two hundred representatives, nor less than one representative for every fifty thousand persons.

"*Article II.* No law, varying the compensation to the members of Congress, shall take effect, until an election of representatives shall have intervened.

"*Article III.* Congress shall make no law establishing religion, or prohibiting the free exercise thereof; nor shall the rights of conscience be infringed.

"*Article IV.* The freedom of speech, and of the press, and the right of people to peaceably assemble and consult for their common good and to apply to the government for redress of grievances, shall not be infringed.

"*Article V.* A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed, but no one religiously scrupulous of bearing arms shall be compelled to render military service in person.

"*Article VI.* No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

"*Article VII.* The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"*Article VIII.* No person shall be subject, except in case of impeachment, to more than one trial, or one punishment, for the same offense, nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law;

nor shall private property be taken for public use without just compensation.

"*Article IX.* In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial; to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

"*Article X.* The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger) shall be by an impartial jury of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment by a grand jury; but, if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may, by law, be authorized in some other place within the same state.

"*Article XI.* No appeal to the Supreme Court of the United States, shall be allowed, where the value in controversy shall not amount to one thousand dollars; nor shall any fact, triable by a jury according to the course of the common law, be otherwise re-examinable, than according to the rules of common law.

"*Article XII.* In suits at common law, the right of trial by jury shall be preserved.

"*Article XIII.* Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

"*Article XIV.* No state shall infringe the right of trial by jury in criminal cases, nor the right of conscience, nor freedom of speech, or of the press.

"*Article XV.* The enumeration in the constitution of certain rights, shall not be construed to deny or disparage others, retained by the people.

"*Article XVI.* The powers delegated by the constitution to the government of the United States, shall be exercised as therein appropriated, so that the legislature shall never exercise the powers vested in the executive or judicial; nor the executive the powers vested in the legislature or judicial; nor the judicial the powers vested in the legislature or executive.

"*Article XVII.* The powers not delegated by the constitution, nor prohibited by it to the states, are reserved to the states respectively."

Proposals Sent from Senate to States

Article the First: After the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall not be less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which, the proportion shall be so regulated by Congress that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

Article the Second: No law varying the compensation for the services of the Senators and Representatives shall take effect until an election of Representatives shall have intervened.

Article the Third: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Article the Fourth: A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

Article the Fifth: No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Article the Sixth: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article the Seventh: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Article the Eighth: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Article the Ninth: In suits at common law, where the value in controversy shall exceed twenty dollars, the right

of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Article the Tenth: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Article the Eleventh: The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Article the Twelfth: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX C

FREE PRESS — FAIR TRIAL

The Genesis of the First and Sixth Amendments to Our Federal Constitution

"Liberty to know, to utter and to argue freely according to conscience is above all liberties."[1]

"In democratic countries, it is not only the right but the duty of every citizen to reveal and complain of official misconduct to criticise existing laws, to favor or oppose changes, and petition for the redress of grievances."[2]

"The framers [of the Bill of Rights] . . . did not invent the conception of freedom of speech as a result of their own experience of the last few years. The idea had been gradually molded in men's minds by centuries of conflict. . . . It was formed out of past resentment against royal control of the press under the Tudors, against Star Chamber and the pillory, against the Parliamentary censorship which Milton condemned in his Areopagitica, by recollections of heavy newspaper taxation, by hatred of the suppression of thought which went on vigorously on the continent during the eighteenth century. . . ."[3]

In order to understand the meaning of "freedom of the press" to the framers of the First Amendment, one must consider the history of restraint upon the written and spoken word.

Control of the written word dates back at least as far as the public burning of undesirable books by the Emperor

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[1] Milton, *Areopagitica*.

[2] Patterson, *Free Speech and a Free Press*.

[3] Chafee, *Free Speech in the United States*.

Augustus.[4] Punishment for writing undesirable material is as old as the Edicts of Constantine making the writing of certain materials punishable by death. Control of writing was effected by the Church after the recognition of the Bishop of Rome as its head. In 490 A.D. a catalogue of forbidden books was issued. Governmental and ecclesiatical censorship was also prevalent in the middle ages.

Pre-Colonial Period Through 1869 in England

When Henry VIII severed the Church of England from the control of the Pope, he recognized the political importance of controlling the press. Punishment for denying the royal power of control of the press was beheading. Control was enforced by the issuance of letters patent granting a monopoly over the privilege of printing and selling books. The exclusive privilege of keeping presses was granted to the "Stationer's Company" by royal charter in 1557. Regulation of the Company was vested in the infamous Court of Star Chamber, which had been granted the power of general censorship.[5]

In the reign of Elizabeth I, the privilege of printing was extended to a select few to publish such books as "should first be seen and allowed." Printing was forbidden except in Oxford, Cambridge and London.[6] According to one writer, the "illiteracy of the general public and its long submission to authority was such that public opposition to the regulation of printing did not at that time manifest itself." [7]

Nevertheless, freedom of speech and press began to be manifest and as a result the publication of seditious libel

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[4] 63 B.C.-14 A.D.

[5] Supra note 2, at 27-8.

[6] *Ibid.*

[7] *Id.* at 31.

against the Queen's government was made a capital offense, to which truth was no defense.[8] Ordinances for the regulation of the press were published by the Star Chamber in 1586 because of "the enormities and abuses of disorderly persons professing the art of printing and selling books." [9] These ordinances authorized the Stationer's Company to search houses and offices in search of unlawful publications and to destroy all such publications and all presses found.

Under the Stuart regime the continuing increase in illegal press activity caused the Star Chamber to issue regulations requiring licensing and registration before publication, under penalty of forfeiture of the presses for failure to comply. The abolition of the Star Chamber by the Long Parliament in 1641 brought the royal prerogative over the press to an end. The passage of the Licensing Acts by the same Parliament in 1643 established parliamentary power, in place of the royal prerogative, forbidding the printing of objectionable books.[10]

Opposition to control of the press became more prevalent with the rise of literacy in England. Notable among the condemnations of the Licensing Acts was Milton's celebrated poem, *Areopagitica*, which was written to inform the people of England of the countervailing arguments to the enactment of those acts. Reacting to this increased opposition, the restored monarchy under Charles II enacted a statute declaring that "the well-government and regulating of printers and printing presses was a matter to public care and concernment, and that by the general licentiousness of the late times many evilly disposed persons had been encouraged to print and sell heretical and seditious books." [11]

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[8] Trial of John Udall, 1 *Howell's State Trials*, 1271 (1613).

[9] Supra note 2 at 32.

[10] *Id.* at 34.

[11] 14 Chas. II, c. 33.

The increased opposition could not be stemmed even by Charles' drawing and quartering violators and destroying their works. Prosecution for violation of the printing ordinances and for seditious libel became a means of destroying political opponents and was administered by the King's Justices most prejudicially.[12]

Opponents of the King and wealthy London merchants financed a multitude of secret printing operations. The English Bill of Rights, enacted in 1685, after the Bloodless Revolution brought William and Mary of Hanover to the throne, established certain political rights of Englishmen, but did not mention freedom of the press. Nevertheless, the control of the press was relaxed, and the Licensing Act was permitted to expire. When Parliament attempted to re-enact the Licensing Act in 1695, its failure to do so marked the end of prior censorship of the press in Britain.[13] Freedom of the press then meant the freedom from previous restraint, but "not a freedom from censure for criminal matter when published." [14] This principle was further enunciated by Lord Mansfield in his charge to the jury in Miller's Case in 1770:

> "As for freedom of the press, I will tell you what it is; the liberty of the press is, that a man may print what he pleases without license; as long as it remains so the liberty of the press is not restrained." [15]

At the turn of the 18th century, the House of Commons, disturbed by an increase in criticism of its activities by certain publishers, decided to take measures to silence its critics. The first step was the aforementioned attempt to re-enact the Licensing Acts. This failing, Parliament de-

[12] Supra note 2, at 41.

[13] *Id.* at 50.

[14] 4 *Blackstone's Commentaries,* 151.

[15] 20 *Howell's State Trials,* 869, 895 (1770).

vised a new method of controlling the press—the stamp tax on newspapers and advertising, passed in 1715.[16] This device was described by the American colonists as "taxes on knowledge." [17] In addition, the English law called for bonds from all publishers and newspapers as a "security for good behavior."

These adverse laws affecting the publication and distribution of newspapers were not fully eliminated in England until 1869 [18]—a year after the adoption of the Fourteenth Amendment to the United States Constitution.[19]

The bill for the repeal of the tax on advertising passed the House of Lords without debate; but the debates in the House of Commons on the advertisment tax are by no means lacking in sentiments similar to those expressed as to the other "taxes on knowledge." Mr. Cobden, M.P., on July 1, 1853, in the House of Commons, said:

> " 'It is a question of a tax upon knowledge; because if you want to have newspapers at all in this country, they can only be supported by funds furnished by advertisements.' " [20]

Even in repealing these odious laws, it should be noted that many in England believed as did Mr. Bentinck, M.P., who in closing the debate on the English bill to repeal the stamp tax, said in the House of Commons on May 11, 1855:

> " 'No advocate of the character of the press of this country could support this measure. He had never yet

[16] 10 Anne, c. 19, paras. 101, 118.

[17] Supra note 2, at 57.

[18] Repeal of advertisement tax, 1853; repeal of stamp tax, 1855; repeal of paper tax, 1861; repeal of "security for good behavior" act, 1869.

[19] Adopted July 23, 1868.

[20] Hansard, "Parliamentary Debates," 16 Victoria, Vol. 128, p. 1108.

heard it argued that the press, able and enlightened as it was, was not in want of some check and safeguard against the ebullitions of party and personal feeling. Nothing could be more injurious to the character of the press, or of the public whom it served, than to take away the restrictions which had prevented not the liberty, but the license of the press, and the want of which would cause the country to be inundated with publications that would not only lead to the destruction of the character of the press, but would be attended by the most mischievous results in all large and populous communities.' " [21]

On the other hand, the most effective argument in the case for the repeal of this tax was that of Sir Edward Bulwer-Lytton on the second reading of the bill in the House of Commons on March 26, 1855:

" 'Sir, the question really is between the tax collector and the public, and it is this—whether it is not time that we should enforce the great principle of the constitution of civil liberty and of common sense which says that opinion shall go free, not stinted nor filched away by fiscal arrangements, but subject always to the laws of the country against treason, blasphemy and slander.' [22]

" 'It is superfluous to argue the principle that opinion should not be indirectly suppressed by a tax, when the boldest man among us dare not invade it by an open law; and, indeed, if we desired to do so, we have no longer the power.' " [23]

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[21] Hansard, "Parliamentary Debates," 18 Victoria, Vol. 138, p. 450.

[22] Hansard, "Parliamentary Debates," 18 Victoria, Vol. 137, p. 1123.

[23] *Id.* at 1124.

The foregoing excerpts from these arguments illustrate the development of the English Common Law in comparison to the express written provisions of our Constitution. The repeal of the British newspaper stamp tax, on the ground that Parliament "no longer had the power" thus to restrain the press, put into effect in England essentially the same immunity against abridgment of freedom of the press, as was written into the Constitution of the United States by the First Amendment some sixty-six years earlier.

It is clear from our Country's early constitutional history that resentment against these unpopular taxes and against the widespread use by prosecutors of seditious libel as a means of controlling the press played a great role in the rising sentiment for independence in the American colonies. It is also certain that the newspaper taxes in England and the colonies had their effect upon the enactment of the First Amendment to the United States Constitution.

Colonial Period in America

"Our liberty depends in freedom of the press and that cannot be limited without being lost." JEFFERSON

The seditious libel trial of John Peter Zenger [24] in New York and his subsequent acquittal by the jury after a charge from the bench that the writing in question was seditious and that truth was no defense, points out the unpopularity of the seditious libel law. The jury was apparently persuaded by the argument put forth by Zenger's attorney (Andrew Hamilton) that the question as to whether the writing was seditious was one for the trier of fact, and that truth was a valid defense.[25]

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[24] 17 *Howell's State Trials*, 675 (1735).

[25] Supra note 3, at 21.

Having decided to pursue the movement toward separation from England, the Continental Congress sought popular support for the cause. In an *Address of the Continental Congress to the Inhabitants of Quebec*, it was declared that the colonists have five inviolable rights: representative government, trial by jury, liberty of person, easy tenure of land, and freedom of press.[26]

The Constitutions of the states of Virginia, Pennsylvania, and Maryland, all enacted in the year of the revolution, included sections granting freedom of the press.[27] The states of Massachusetts and Delaware also enacted similar clauses in their constitutions in 1780 and 1782, respectively.[28] The Virginia Resolution of Independence, written prior to that State's Constitution, contains the following statement:

> "The freedom of the press is one of the greatest bulwarks of liberty, and can never be restrained by any despotick government." [29]

The United States Constitution, as originally drafted, contained no section regarding the press.[30] During the debates in the drafting sessions, Delegate Pinckney of South Carolina, suggested a clause that would grant safeguards to the press.[31] His suggested clause read as follows:

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[26] 1 *Journal of Continental Congress*, 57 (1800 Edition).

[27] Rutland, *The Birth of The Bill of Rights*, 1776-1794, 78.

[28] *Ibid.*

[29] Virginia Declaration of Rights Adopted June 12, 1776.

[30] U.S. Constitution, Articles I-VII. The Articles of Confederation were also silent on the subject of the press, Rutland. *The Birth of The Bill of Rights*, 1776-1794, 78.

[31] *Supra* note 3, at 14.

"The liberty of the press shall be inviolably preserved." [32] The various members of the Convention made little comment on this proposed language regarding the press. The comments that were recorded at the state conventions on ratification reflect the strong feeling of that time toward this sacred freedom. Mr. Patrick Henry said:

> "With respect to the freedom of the press, I need say nothing further, for it is hoped that the gentlemen who shall compose Congress will take care to infringe as little as possible on the rights of human nature." [33]

Hon. James Lincoln said:

> "The liberty of the press was the tyrant's scourge—it was the true friend and finest supporter of civil liberty; therefore, why pass it by in silence?" [34]

The suggestion made by Pinckney to include freedom of the press in the Constitution was, however, rejected on the theory that the powers of Congress extended only to matters expressly delegated to it. Therefore, so long as freedom of the press was not mentioned, Congress would have no authority to legislate on the subject. [35] Others took the opposite position, namely, that Congress had implied as well as express powers, and it was, therefore, necessary specifically to preclude Congress from legislating in the field of freedom of the press.[36]

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[32] 5 *Elliot's Debates*, 445.

[33] 3 *Elliot's Debates*, 449.

[34] 4 *Elliot's Debates*, 314.

[35] Supra note 3, at 143; also see Rogge, *Congress Shall Make No Law . . .*, 56 Mich. L. Rev. 331, 338-340 (1958).

[36] 3 *Elliot's Debates*, 445-9 (2d Ed. 1836); Patterson, *Free Speech and Free Press*, 116-7.

When the Constitution was presented to the states for ratification, there arose many objections to the fact that there were no clauses protecting freedom of press and religion.[37] And in fact the States were persuaded to ratify the Constitution only upon the understanding that a satisfactory Bill of Rights would be added to the existing document.[38]

The Bill of Rights

In the years before the adoption of the Bill of Rights, "freedom of speech was conceived of as giving a wide and genuine protection for all sorts of discussion of public matters."[39] That this was not a universally held view was pointed out by Benjamin Franklin, a noted printer, when he said:

> "Few of us, I believe, have distinct Ideas of its [freedom of press] Nature and extent. . . . If it means the Liberty of affronting, calumniating, and defaming one another, I, for my part, own myself willing to part with my Share of it when our Legislators shall please so to alter the Law, and shall cheerfully consent to exchange my *Liberty* of Abusing others for the Privilege of not being abus'd myself."[40]

At this time, the Supreme Court of Pennsylvania ruled that truth was not a valid defense to libel, thereby diminishing the alleged scope of this freedom.[41] It should be noted, however, that the English common law definition of libel or freedom of the press (see definition of Lord Mans-

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[37] Supra note 2, ch. 4.

[38] Supra note 27, at 148, 154, 157, 161-2, 171-4, 181.

[39] Supra note 3, at 13.

[40] 10 *Writings of Benjamin Franklin*, 378 (Smyth Ed. 1907) [Emphasis in original].

[41] *Republica* v. *Oswald*, *Penn. Reports*, 1 Dallas 319 (1788).

field, *supra*) did not apply in the United States after the revolution.

> "One of the objects of the revolution was to get rid of the English common law on liberty of speech and the press."[42]

Furthermore,

> "Liberty of the press as declared in the First Amendment, and in the English common law crime of seditious libel cannot co-exist."[43]

These conflicting views left the perimeters on the freedom of the press undefined up to the date of the First Session of Congress in 1789.

Mr. Madison introduced into the First Congress nine proposed amendments to the Constitution.[44] Madison, a shrewd politician, only proposed amendments which had a probability of passage in the states. He explained: "Nothing of a controvertible nature ought to be hazarded by those who are sincere in wishing for the approbation of ⅔ of each House, and ¾ of the State Legislatures. . . ."[45] With reference to freedom of the press, Mr. Madison made the following two proposals contained within two separate amendments:

> "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[46]
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[42] Schofield, *Essays on Constitutional Law and Equity*, 521, 522.

[43] *Id.*, at 535.

[44] 1 *Annals of Congress* 451 (see appendix A).

[45] 5 *Writings of James Madison*, 4067 (Hunt Ed.).

[46] 1 *Annals of Congress*, 451.

"No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[47]

The first of the above proposals made by Mr. Madison, dealing with the freedom of the press, was considered the second clause of his proposed Fourth Amendment. The second proposal comprised his entire Fifth Amendment. It should be noted that Madison's proposals concerning trial by jury were contained in his proposed Fifth and Seventh Amendments.[48] After much debate on the floor of Congress, it was decided that all of Madison's proposed amendments should be sent to Committee before being dealt with on the floor.[49]

On Tuesday, July 28, 1789, the Committee reported the amendments to the floor labeling them "Propositions."[50] In Committee, Mr. Madison's two proposals regarding freedom of the press were altered in language, but left as two distinct amendments.[51] It is also important to note that of the nine amendments proposed by Madison, he considered the one relating to free speech, and conscience, "the most valuable amendment in the whole list."[52]

The "fundamental" rights provoked little discussion in either the House or the Senate; the other suggested amendments brought about sharp controversy. While some members of Congress were against the amendments, all were in agreement that those singled out by Madison should be included if the amendments were enacted.[53]

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[47] *Id.* at 452.

[48] *Ibid.*

[49] *Id.* at 468.

[50] *Id.* at 699.

[51] *Id.* at 783.

[52] *Id.* at 784.

[53] Supra note 27, at 208.

The debates leading up to and concerning the First Amendment leave "freedom of the press" undefined. An understanding of what was meant can be gleaned from the controversy that arose out of the Sedition Act (passed in 1798). Madison made it clear that the First Amendment was directed against both prior restraint and subsequent punishment.[54]

Madison also described the First Amendment as being the "essential difference between the British Government and the American Constitution."[55] There has been some argument put forth that Madison's statement is incorrect. Some authors feel the First Amendment is the same as the laws of contempt of the British Government. One theory construes the First Amendment as enacting Blackstone's concept that "The liberty of the press . . . consists in laying no *previous* restraints upon publications and not in freedom from censure for criminal matter when published."[56] This Blackstonian theory dies hard. Whether or not he stated that law correctly, an entirely different view of the liberty of the press was soon enacted in Fox's Libel Act, so that Blackstone's view does not even correspond to the English law of the last 150 years. Furthermore, Blackstone is notoriously unfitted to be an authority on the liberty of American colonists, since he upheld the right of Parliament to tax them, and was pronounced by one of his colleagues to have been an anti-republican lawyer.[57] Not only is the Blackstonian interpretation of our free speech clause inconsistent with eighteenth-century history, but it is contrary to modern decisions and wholly out of accord with a common-sense view of the relations of state and citizen. Judge Cooley, the eminent authority

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[54] Carroll, *Freedom of Speech and of the Press in the Federalists Period:* The Sedition Act, 18 Mich. L. Rev. 615, 635 (1920).

[55] Chafee, *Free Speech in The United States,* 19.

[56] IV Blackstone, *Commentaries,* 151.

[57] Dean of St. Asaph's Case, 4 Doug. 73, 172 (1784).

on Constitutional law, made the following rebuttal to Blackstone:

> ". . . The mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications, . . . Their purpose [of the free-speech clauses] has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. . . . The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare people for an intelligent exercise of their rights as citizens."[58]

It is clear, therefore, that the authors of the First Amendment intended the constitutional protection to exceed the Blackstonian idea that liberty of the press supports nothing except a freedom from censorship.[59]

In the year 1788, after a long talk with Thomas Jefferson, Thomas Paine wrote:

> "After I got home, being alone and wanting amusement I sat down to explain to myself (for there is such

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[58] Supra note 55, at 11.

[59] *Id.* at 18.

> a thing) ideals of natural and civil rights and the distinction between them—I send them to you to see how nearly we agree.
>
> "Suppose 20 persons, strangers to each other, were to meet in a country not before inhabited. Each would be a sovereign in his own natural right. His will would be his Law,—but his power, in many cases, inadequate to his right, and the consequence would be that each might be exposed, not only to each other but to the other nineteen.
>
> "It would then occur to them that their condition would be much improved, if a way could be devised to exchange that quantity of danger into so much protection, so that each individual should possess the strength of the whole number. As all their rights, in the first case, are natural rights, and the exercise of those rights supported only by their own natural individual power, they would begin by distinguishing between those rights they could exercise fully and perfectly and those they could not.
>
> "Of the first kind are the rights of thinking, speaking, forming and giving opinions, and perhaps all those which can be fully exercised by the individual without the aid of exterior assistance—or in other words, rights of personal competency—Of the second kind are those of personal protection of acquiring and possessing property, in the exercise of which the individual natural power is less than the natural right.
>
> "Having drawn this line they agree to retain individually the first Class of Rights or those of personal Competency; and to detach from their personal possession the second Class, or those of defective power and to accept in lieu thereof a right to the whole power produced by a condensation of all the parts. These I conceive to be civil rights or rights of Compact, and are distinguishable from Natural rights, because in the

one we act wholly in our own person, in the other we agree not to do so, but act under the guarantee of society." [60]

The statement by Paine is not nearly so novel as he might have imagined. According to Locke there are "primary" and "secondary" qualities of freedom. The primary qualities are like solidity, extension, figure and mobility; secondary qualities are like colors, sounds and tastes, which are "powers to produce various sensations in us by their *primary qualities.*" [61] It is a short leap from Locke's grade of "primary" qualities to Paine's corresponding "natural rights of personal competency"; or from Locke's "secondary" qualities to Paine's corresponding "rights of compact," thereby making the freedom of speech and press "natural rights" in contrast to other personal rights in the Amendments. While expounding on the Bill of Rights to the House of Representatives, Mr. Madison analyzes the various rights in terms of their origins:

" 'In some instances they assert those rights which are exercised by the people in forming and establishing a plan of Government. In other instances, they specify those rights which are retained when particular powers are given up to be exercised by the Legislature. In other instances, they specify positive rights, which may seem to result from the nature of the compact. Trial by jury cannot be considered as a natural right, but a right resulting from a social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.' " [62]

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[60] Cohn, *The Firstness of the First Amendment,* 56 Yale L.J. 472 (1956).

[61] Locke, II *Essays Concerning Human Understanding,* C VIII.

[62] Supra note 60, at 473.

A short time later, Madison proposed still another order for grading these rights. Some guarantees of the Bill of Rights, according to Madison, are asserted against the Executive Branch, others against the Legislative Branch, some against the Federal Government, and others against the State governments. Since, however, the greatest danger, as he believed, lay in the democratic community, the "prescriptions in favor of liberty ought to be leveled in that quarter." [63] With this method of classifying, Madison thought the First Amendment must always be paramount.[64]

It seems appropriate at this juncture to explain how Mr. Madison's proposed Amendments concerning free speech and free press became the First Amendment. As was stated previously, the two amendments proposed by Mr. Madison dealing with freedom of speech and press comprised part of his Fourth Proposal and all of his Fifth Proposal. When the amendments were reported out of committee to the floor of the Congress, Mr. Madison's two proposed amendments were altered slightly, but left as two separate amendments. Of the committee's first four Proposals, the First was a new preamble; the Second dealt with apportionment; the Third dealt with pay to members of Congress; and the Fourth dealt with freedom of religion, and freedom of speech and press.

The entire Fifth Proposal still dealt with freedom of speech and press. After much discussion on the floor of the House, the Proposal dealing with the suggested new Preamble was rejected, thereby making the Proposal dealing with free speech and the press part of the Third and the total of the Fourth Proposal of the House. The members of the House then combined the total of the Fourth Proposal and the part of the Third Proposal dealing with freedom of the press into one Proposal, thereby making

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[63] *Id.* at 475.

[64] Supra note 52.

the Proposal dealing with freedom of speech and press the Fourth Proposal of the House. The House also added a number of new proposals to those of Madison's. Of these, the one numbered "XIV" also dealt with freedom of the press.

In the Senate, there was an attempt to limit the all-encompassing scope of the freedom of speech and press proposal, by adding the words, "in as ample a manner as hath at any time been secured by the common law."[65] The rejection on the Senate floor of this suggested addition to the proposed amendment clearly indicates that the Senators gave consideration to the fact that the freedom set forth in the proposed Fourth Amendment was absolute, and on reflection decided it was their desire to have it absolute. After much debate, the suggested Third and Fourth Amendments and the free press and speech language of the proposed Fourteenth Amendment, as proposed by the House, were combined into one amendment, dealing with freedom of religion, speech and press. This became Proposal Number Three.[66] It was sent to the states for ratification as Amendment Number Three of twelve suggested amendments.[67] The first and second proposed amendments dealing with apportionment and pay to Congressmen did not receive ratification by the requisite three-fourths of the State legislatures. As a result thereof, the Free Speech—Free Press Amendment moved from the Third Proposed Amendment to become the First Amendment to the Constitution.

It is noteworthy that the first two amendments sent to the States, and not ratified, were purely administrative matters and in no way dealt with basic freedoms. The various states obviously felt that these administrative mat-

[65] 1 *Journal of the Senate* 70 (Sept. 3, 1789).

[66] Id. at 77 (Sept. 9, 1789).

[67] 2 *Annals of Congress* (Appendix) 1984-1985.

ters should not clutter up the amendments to the Constitution that were to deal only with basic personal freedoms. Therefore, it can be seen that the free press amendment was the first amendment dealing with basic personal freedoms and, as previously stated, Madison, the proposer of the amendments, considered it the most important freedom of all.

Further proof that such was the feeling in the 18th century is shown by a letter of Thomas Paine to Thomas Jefferson in which the famed pamphleteer stated that the rights of free speech, press, and belief are primary natural rights fully exercised by individuals independent of organized society, while other rights involving an individual's protection against his society or government arise from the "social compact." The latter category included the rights pertaining to trial.[68] Paine's concept stirred the imagination of Thomas Jefferson, who, in a letter to Noah Webster, December 4, 1790, stated that there are two classes of rights: those of belief and opinion which are completely foreign to the exercise of government, and those of personal protection (in which he grouped both freedom of press and guarantees of fair trial) which he described as "fences against governmental encroachment."[69] Cohn pointed out that while Jefferson grouped freedom of press and trial together, he considered the rights of free opinion and dissemination thereof to be essential and primary to all others.[70]

In commenting on the Bill of Rights to the First Congress, Madison, influenced by his correspondence with Jefferson, stated that freedom of the press and the right of free conscience are among the "choicest privileges of the

[68] Supra note 60, at 467.

[69] *Id.* at 474.

[70] *Ibid.*

people."'[71] He grouped other rights such as trial by jury as not being natural rights.[72]

There is ample evidence as to why the First Amendment is first. Inferences can be drawn from the fact that there was little debate over the freedoms included in this amendment, and that many felt that these included rights were so fundamental that all people had access to them, while other rights were granted through the function of society. It is noteworthy that Thomas Jefferson commented in a letter to Edward Carrington that:

> "The basis of our Government being the opinion of the people, the very first object would be to keep that right [of free press]; and were it left for me to decide whether we should have a government without newspapers or newspapers without a government I should not hesitate a moment to prefer the latter."'[73]

This view of the importance of the liberty of the press was not unique to Jefferson and his Republican friends. Federalist John Marshall responding to Talleyrand's request that the United States Government take measures to curb anti-French publicity in the press, stated that:

> "The genius of the Constitution, and the opinions of the people of the United States, cannot be overruled by those who administer the Government. Among those principles deemed sacred in America; among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence, and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this liberty is often carried to excess, that it has sometimes degenerated into licentiousness, is seen and lamented; but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied: perhaps it is a shoot which cannot be stripped from the stalk, without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America. No regulations exist which enable the Government to suppress whatever calumnies or invectives any individual may choose to offer to the public eye; or to punish such calumnies and invectives, otherwise than by a legal prosecution in courts which are alike open to all who consider themselves as injured."'[74]

[71] Supra note 46, at 453.

[72] Supra note 60, at 473.

[73] Recorded in Chenery, W. L., *Freedom of the Press*, 29 (1955).

The Supreme Court on History of the First Amendment

The above-described history of the First Amendment has been treated at length by the Supreme Court. It is clear from the cases that the Court bases its high regard for the First Amendment on the solid ground of historical development.

The following extracts from some of the more important cases exemplify the Court's attitude on the fundamental freedom of the press.

> "* * * The point of criticism has been 'that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions;' and that, 'the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for hamless publications.' "'[75]

[74] Recorded in 56 *Michigan L. Rev.* 331, 347 (1958).

[75] *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 715 (1930).

"For more than a century prior to the adoption of the amendment—and, indeed, for many years thereafter—history discloses a persistent effort on the part of the British government to prevent or abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light, however, truly, the agencies and operations of the government. The struggle between the proponents of measures to that end and those who asserted the right of free expression was continuous and unceasing."[76]

"* * * liberty is something more than exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts. * * *"[77]

"* * * The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. * * *"[78]

"There are no contrary implications in any part of the history of the period in which the First Amendment was framed and adopted. No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. * * *"[79]

"Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[80]

[76] *Grosjean* v. *American Press Co.*, 297 U.S. 233, 245 (1935).

[77] *Palko* v. *Connecticut*, 302 U.S. 319, 327 (1937).

[78] *Thornhill* v. *State of Alabama*, 310 U.S. 88, 97 (1939).

Freedom of the Press is a Broad Freedom

Freedom of the press has been logically extended to include not only the right to print but also the right to publish and distribute what has been printed. In *Winters* v. *New York*[81] the Supreme Court said:

"Although we are dealing with an aspect of a free press in its relation to public morals, the principles of unrestricted distribution of publications admonish us of the particular importance of a maintenance of standards of certainty in the field of criminal prosecution for violation of statutory prohibitions against distribution."[82]

Nor can freedom of the press be limited to matters of social significance. It extends to matters of no significance and matters which are calculated only to entertain.

"We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar

[79] *Bridges* v. *California*, 314 U.S. 252, 265 (1941).

[80] *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964).

[81] 333 U.S. 507 (1948).

[82] *Id.* at 510.

with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." [83]

The extent of the freedom was stated in *Bridges* v. *California*:

"• • • The only conclusion supported by history is that unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society." [84]

The Supreme Court has left no doubt that freedom of the press occupies a "preferred position" [85] and is an "essential personal liberty." [86]

Clear and Present Danger Test

In spite of the breadth of the guarantees of the First Amendment, no freedom is ever absolute, and freedom of the press is no exception. Some of the most commonly recognized legal restraints on a free press are found in libel, obscenity, contempt and treason laws.

These restraints must, of course, have their limitation, and it is in attempting to define this limitation that the Supreme Court has had some of its greatest difficulty.

The clear and present danger test was first enunciated by Justice Holmes in 1919 in *Schenck* v. *United States*.[87]

[83] *Ibid.*

[84] Supra note 79.

[85] *Marsh* v. *Alabama*, 326 U.S. 501, 509 (1946).

[86] *Near* v. *Minnesota*, supra note 75.

[87] 249 U.S. 47 (1919).

Schenck had been charged with inciting resistance to the World War I draft by circulating various pamphlets. The Court there said:

"• • • We admit that in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. *Aikens* v. *Wisconsin*, 195 U.S. 194, 205, 206, 49 L. ed. 154, 159, 160, 25 Sup. Ct. Rep. 3. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 439, 55 L. ed. 797, 805, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492. *The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.* When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court regard them as protected by any constitutional right. • • •" [Emphasis added] [88]

The clear and present danger test has been found applicable by the Supreme Court in contempt cases involving alleged interference by individuals, and the press, with a fair trial.

In *Bridges* v. *California*,[89] convictions resting upon comments pertaining to pending litigation which were pub-

[88] *Id.* at 52.

[89] Supra note 79.

lished in newspapers, were reversed by the Supreme Court as an abridgement of freedom of the press guaranteed by the First Amendment. The Court recognized that the clear and present danger test did not automatically solve all problems of restrictions on a free press, but it said it had "afforded practical guidance in a great variety of cases." [90] The Court went on to say:

> "Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial.' "
>
> • • •
>
> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." [91]

As will be shown, *infra*, this same rationale was later applied in *Pennekamp* v. *Florida* [92] and *Craig* v. *Harney*.[93]

The Sixth Amendment

The Sixth Amendment calls for a "speedy and public trial." The *public* trial was taken from English common

[90] *Id.* at 262.

[91] *Ibid.*

[92] 328 U.S. 331 (1946).

[93] 331 U.S. 367 (1947).

law and included in the Bill of Rights as protection against such judicial travesties as the Star Chamber tactics, the Spanish Inquisition and the French Monarchy's *lettre de cachet.*

The following thumbnail history of the Sixth Amendment right to a public jury trial is taken from "Public Information, Criminal Trials and the Cause Celebre." [94]

> "After the Norman Conquest, there was a gradual decline in the use of primitive criminal processes, such as trial by ordeal, and a growth of the modern notion of trial by jury. The origin of this method of trying cases came not from ancient customs, but from the exercise of royal prerogative by the Frankish Kings. The kings set up inquests to discover the extent of the royal rights in the community, primarily in financial matters. This practice later included inquiries into criminal offenses. William the Conqueror brought this practice to England. Inquests or assizes, forerunners of the grand jury, became the usual procedure in criminal matters by the end of the twelfth century. Indictment by an inquest created a presumption of guilt. By the thirteenth century, to give the accused a chance to rebut the presumption, he was asked to 'put himself upon the country.' This meant that the accused would accept the decision of the community on the question of guilt, as it was given by his neighbors on the jury. The exact time when this second jury developed is not known. By 1302, the defendant was permitted to challenge any juror who sat on the 'petit jury.' Both of the early juries were chosen for their knowledge of the events that caused the accused to be suspect, not for their freedom from bias. This 'witness' type jury gave way by the sixteenth century to a procedure in which the litigants produced the evidence upon which the jury relied. This technique, though originally used

[94] Ronald Goldfarb, 36 N.Y.U.L. Rev. 810 (1961).

only in civil cases, was extended to criminal trials by 1700. But knowledge of the nature of the indictment and the right of the accused to counsel were still controlled by the crown. The petit jury, however, gained much independence from the decision in *Bushell's* Case. In that case a juror who ignored a direction of the crown to bring in a verdict of guilty was jailed after the jury had acquitted the defendant. The juror brought habeas corpus and was freed. Thereafter, the jury was free to decide as conscience and the evidence warranted, not as the government commanded.

"The colonists in America firmly believed in trial by jury. During the Revolution the Continental Congress granted to the inhabitants of each colony the right to have public trials by 'their peers of the vicanage,' the right to counsel and the right to present witnesses. These rights also appeared in the constitutions of the states, and were eventually incorporated into the federal constitution."

While the right to a public trial is firmly entrenched in our common law, it has never been settled to whom this right belongs, the accused or the public. In *United Press Ass'n* v. *Valente*,[95] the Court felt that the right to an open trial was a personal right belonging only to the defendant. But in *E. W. Scripps Co.* v. *Fulton*,[96] the Court considered it a right belonging to the public at large.

In *State* v. *Keeler*,[97] that Court said of this right:

> "primarily it is for the benefit of the accused—But it likewise involves questions of public interest and concern. The people are interested in knowing, and have the right to know how their servants—the judges,

[95] 308 N.Y. 71, 123 N.E. 2d 777 (1954).

[96] 100 Ohio, App. 15, 125 N.E. 2d 896 (1955).

[97] 52 Mont. 205, 156 Pac. 1080 (1916).

> county attorney, sheriff, and clerk—conduct the public's business—but the public is interested in every criminal trial that court officers and jurors are kept keenly alive to a sense of their responsibility and the importance of their functions, and interested spectators by their presence are the most potent influence to accomplish this desired end."[98]

While the right to a public trial has been held to belong to the public at large, that right is a qualified one. As shown in "Right of Public and Press to be Admitted to a Criminal Trial,"[99] people have been excluded from courtrooms for all of the following reasons:

Overcrowding; *Kugadt* v. *State*.[100]

Disorder; *Grummett* v. *State*.[101]

To Protect Public Health; *People* v. *Miller*.[102]

Exclude Youth to Protect Morals; *United States* v. *Kobli*.[103]

Exclude All to Protect Public Morals; *Reagan* v. *United States* [104] and *People* v. *Jelke*.[105]

To Allow Young Girl to Testify; *Kirstowsky* v. *Superior Court*.[106]

[98] *Id.* at 1083.

[99] *Right of the Public and Press to be Admitted to a Criminal Trial*, 35 Tex. L. Rev. 429.

[100] 38 Tex. Crim. 681, 44 S.C. 989 (1898).

[101] 22 Tex. Crim. 36, 2 S.W. 631 (1886).

[102] 257 N.Y. 54; 177 N.E. 306 (1931).

[103] 172 F.2d 919 (3rd Cir. 1949).

[104] 202 Fed. 488 (9th Cir. 1913).

[105] 308 N.Y. 56, 123 N.E. 2d 769 (1954).

[106] 300, P. 2d 163 (Cal. Dist. Ct. App. 1956).

In *In re Oliver*,[107] the Supreme Court held that Michigan had denied a grand jury witness due process of law by convicting him of contempt in a trial from which the public was excluded. In its opinion, the Court recognized that an open trial prevented the use of the court as an instrument of persecution; gave the public, through observation, a feeling of confidence in the judicial system; and encouraged witnesses to give pertinent and truthful testimony. In addition, that Court, in *State* v. *Keeler*,[108] stated that a public trial can be educational to the public and impresses the judge with his responsibility. Further, a public trial allows an observer an opportunity to see that the accused receives neither favor nor abuse; it also offers a witness, who might not otherwise be found, an opportunity to come forward and be heard if he desires to offer or dispute testimony.

While it must be conceded that the newspaper's right to attend a trial is generally no greater than the right of the public at large, it has been suggested in "Right to a Public Trial,"[109] that barring the curiosity seekers but allowing the press admittance would better fulfill the purposes of a public trial and promote justice more effectively.

In summary, it can be said that exclusion of the public (and the press) from a trial is justified only under very few circumstances where the harm caused by its attendance is greater than the good which automatically accompanies an open trial. The rationale behind a public trial is that the people should be present when the people's justice is being distributed, and the newspaper represents and informs all who cannot be personally present.

Contempt by Publication

As will be shown by the cases set forth in the section on "History of Contempt" immediately following, the

[107] 333 U.S. 257 (1948).

[108] 52 Mont. 205, 156 Pac. 1080 (1916).

[109] Radin, 6 Temp. L.Q. 381 (1932).

matter of primary concern other than the constitutionally guaranteed right to a public trial has been the other requirement of the Sixth Amendment requiring an impartial jury.

It has been asserted that "pre-trial publicity" given a criminal and the crime of which he is accused has influenced jurors and prospective jurors. Such publicity has led to contempt of court charges being placed against publishers and/or editors of the newspapers involved. Criticism of a judge or the alleged attempt to influence him, are the other main sources of contempt charges placed against newspapers.

It should be noted that there are two types of contempts: civil and criminal. The former is disobedience by a party to an order of the court involving only a matter of a private nature. The latter stems from an alleged hindrance to the administration of justice. Criminal contempt is further divided into acts which are committed in the presence of the court, and those committed out of the presence of the court, the latter being known as "constructive" contempt.

History of Contempt

Sir John Fox in his *The History of Contempt of Court* stated that:[110]

> "The rules for preserving discipline essential to the administration of justice, came into existence with the law itself, and contempt of court (contemptas curiae) has been a recognized phrase in English law from the twelfth century to the present time."

The present English contempt law, which was also followed until relatively recent times in this country, was first set forth in the 1760's in *King* v. *Almon*.[111] There, in find-

[110] Published in 1927.

[111] Unreported officially but see Wilmont *Notes of Opinions and Judgments*, 243 (1802).

ing a bookseller guilty of constructive contempt in publishing a libel, the Judge did not cite any authority but claimed such summary procedures were of "immemorial usage."

There were, however, few cases of contempt in England between 1765 and 1888, when the Law of Libel Act of 1888 was enacted.[112] While the Act granted the newspapers permission to publish reports of a proceeding while it was in progress, the restriction on the press was that the reports be "fair and accurate." The Act provides that once a writ is issued, the case is considered pending and the newspapers are restricted in their reporting. If the material published is inadmissible into evidence, the report is not "fair and accurate."

As shown in *Rex* v. *Davis*,[113] the newspaper may report what has taken place in open court but any publication reasonably calculated to interfere with the administration of justice is unlawful, and no actual interference need be shown. And as shown in *Rex* v. *Editor of the Daily Mail*,[114] depending on the circumstances of the case, contempt is possible even if there is no intention to interfere, if the publication "might conceivably prejudice a pending trial."

In the United States, the Courts were given almost unlimited contempt power until 1831, when, after a number of flagrant abuses of this power, Congress passed a bill entitled An Act Declaratory of the Law Concerning Contempts of Court.[115] The Act gives the Federal courts power to punish, among other things, misbehavior of any person in the presence of the court or "*so near thereto* as to obstruct the administration of justice." [Emphasis added]. In 1918 the heart was taken out of the 1831 statute when

[112] 51 and 52 Vict. c. 64 § 3.

[113] (1945) K.B. 485.

[114] 44 T.L.R., 303, 300 K.B. (1928).

[115] 4 Stat. 487 (1831) (substantially embodied in 18 U.S.C. § 401 (1958).

the Supreme Court in *Toledo Newspaper Co.* v. *United States*,[116] showed that "so near thereto" was a *causal* provision by construing it as a "reasonable tendency" test rather than giving it its obvious *geographical* meaning. It was not until 1941 that *Toledo* was overruled by *Nye* v. *United States*[117] wherein the Court gave the obvious geographical interpretation to "so near thereto" and a judge's power to punish summarily for constructive contempt was again limited, as it was intended.

> "The question is whether the words 'so near thereto' have a geographical or a causal connotation. Read in their context and in the light of their ordinary meaning, we conclude that they are to be construed as geographical terms."[118]

Also in 1941, the Supreme Court, in companion cases, decided *Bridges* v. *California* and *Times Mirror Co.* v. *Superior Court*.[119] In these cases, for the first time, the "clear and present danger" test was applied to contempt by publication cases. Here the newspaper's right to publish was not predicated on the 1831 statute, as in *Nye*, but rather on the First Amendment. In that case, Harry Bridges sent a public telegram to the Secretary of Labor calling a particular judge's decision outrageous, and asserting that his union "did not intend to allow state courts to override the majority vote of members . . . and to override the National Relations Board." The Supreme Court of California held that the publication had a "reasonable tendency" to interfere with the orderly administration of justice, and that freedom of expression was subordinate to judicial decorum.

[116] 247 U.S. 402 (1918).

[117] 313 U.S. 33 (1941).

[118] *Id.* at 48.

[119] Supra note 79.

In reversing, the United States Supreme Court stated:

"• • • Here, as in the Nye Case, we need not determine whether the statute was intended to demarcate the full power permissible under the Constitution to punish by contempt proceedings. But we do find in the enactment viewed in its historical context, a respect for the prohibitions of the First Amendment, not as mere guides to the formulation of policy, but as commands the breach of which cannot be tolerated." [120]

• • •

"History affords no support for the contention that the criteria applicable under the Constitution to other types of utterances are not applicable, in contempt proceedings, to out-of-court publications pertaining to a pending case." [121]

• • •

"• • • It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion. • • •" [122]

• • •

"• • • But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for

[120] *Id.* at 267.

[121] *Id.* at 268.

[122] *Ibid.*

judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases. • • •" [123]

In 1946 the Supreme Court emphasized its decision in the *Bridges* case by reversing the Supreme Court of Florida in *Pennekamp* v. *Florida* [124] and holding that the contempt holding of that State court was violative of the petitioners' right of free expression in the press under the First and Fourteenth Amendments. The case involved the publication by the Miami Herald of two editorials which were considered by the lower court to be contemptuous of the Circuit Court and its judge in that they were unlawfully critical of the administration of criminal justice in certain cases then pending before the Court. The Court said:

"• • • We must, therefore, weigh the right of free speech which is claimed by the petitioners against the danger of the coercion and intimidation of courts in the factual situation presented by this record.

"Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve. Discussion that follows the termination of a case may be inadequate to emphasize the danger to public welfare of supposedly wrongful judicial conduct. It does not follow that public comment of every character upon pending trials or legal proceedings may be as free as a similar comment after complete disposal of the litigation. Between the extremes there are areas of discussion which an understanding writer will appraise in the light of the effect on himself and on the public of creating a clear and present danger to fair and orderly judicial administration. Courts must have power to protect the interests

[123] Id. at 271.

[124] 328 U.S. 331 (1946).

of prisoners and litigants before them from unseemly efforts to pervert judicial action. *In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases.* Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." [Emphasis supplied].[125]

• • •

"What is meant by clear and present danger to a fair administration of justice? No definition could give an answer. Certainly this criticism of the judges' inclinations or actions in these pending nonjury proceedings could not directly affect such administration. This criticism of their actions could not affect their ability to decide the issues. Here there is only criticism of judicial action already taken, although the cases were still pending on other points or might be revived by rehearings. For such injuries, when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants." [126]

• • •

"As we have pointed out, we must weigh the impact of the words against the protection given by the principles of the First Amendment, as adopted by the Fourteenth, to public comment on pending court cases. We conclude that the danger under this record to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible public comment. When that door is closed, it closes all doors behind it." [127]

[125] *Id.* at 346.

[126] *Id.* at 348.

[127] *Id.* at 349.

And again the next year, the Supreme Court followed the principles set forth in *Bridges,* in *Craig* v. *Harney.*[128] There the publisher and certain members of the staff of a Corpus Christi, Texas newspaper were found guilty of contempt in publishing an editorial and news stories concerning the judge's supposed improper handling of a particular case. The newspaper called the Judge's action "arbitrary" and a "travesty on justice" and was quite pointed in its criticism. The Supreme Court reviewed the clear and present danger test, quoted from the *Pennekamp* case and then stated:

> "• • • The history of the power to punish for contempt (see *Nye* v. *United States*, 313 US 33, 85 L ed 1172, 61 S Ct 810, and *Bridge* v. *California*, 314 US 252, 86 L ed 192, 62 S Ct 190, 159 ALR 1346, both *supra*) and the unequivocal command of the First Amendment serve as constant reminders that freedom of speech and of the press should not be impaired through the exercise of that power, unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice." [129]
>
> • • •
>
> "• • • In that sense the news articles were by any standard an unfair report of what transpired. But inaccuracies in reporting are commonplace. Certainly a reporter could not be laid by the heels for contempt because he missed the essential point in a trial or failed to summarize the issues to accord with the views of the judge who sat on the case." [130]
>
> • • •
>
> "This was strong language, intemperate language, and, we assume, an unfair criticism. But a judge may

[128] 331 U.S. 367 (1947).

[129] *Id.* at 373.

[130] *Id.* at 374.

not hold in contempt one 'who ventures to publish anything that tends to make him unpopular or to belittle him. . . .' See Craig v. Hecht, 263 US 255, 281, 68 L Ed 293, 301, 44 S Ct 103, Mr. Justice Holmes dissenting. The vehemence of the language used is not alone the measure of the power to punish for contempt. The fire which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." [131]

As proof of how restrictive the "clear and present danger" test is, in no case subsequent to *Bridges* has the Supreme Court found the danger "clear and present" enough to justify punishment. In his dissenting opinion in *Craig* v. *Harney*, Justice Frankfurter recognized that:

"Hereafter states cannot deal with direct attempts to influence the disposition of a pending controversy by a summary proceeding, except when the misbehavior physically prevents proceedings from going on in court, or occurs within its immediate proximity." [132]

The idea has been often advanced that while no "clear and present danger" to justice may exist where the individual allegedly 'influenced' by the publication was a judge, whose judicial temperament enables him to disregard intended 'influences,' the situation may be very different where a jury is involved. This situation arose in 1950 in *Baltimore Radio Show* v. *Maryland*.[133] Three Baltimore radio stations broadcast a murder suspect's previous record and the fact that he had confessed. The accused waived his right to a jury trial on the ground that an impartial jury could not be found. The stations were found in con-

[131] *Id.* at 376.

[132] *Id.* at 391.

[133] 67 A.2d 497 (1949) cert. den. 338 U.S. 912 (1950).

tempt by the lower court because the broadcasts interfered with a fair trial. The Court of Appeals of Maryland reversed, following the Supreme Court rationale that there was no "clear and present danger" to justice. No longer in Maryland could a distinction be made between jury and non-jury cases. The Supreme Court denied certiorari but stated that its denial was not an indication that it approved of Maryland's decision.

A contempt rule which summarily punishes for something less than a clear and present or real and tangible danger to justice would be doubly dangerous. First, it would necessarily be so vague as to place an improper burden on the newspaper to determine in advance what the caprice of the judge might be with regard to any given story concerning a pending criminal case. Any mention other than the name of the accused and the nature of the alleged crime could lead to a contempt citation.

Second, when the court conducts a contempt proceeding, it exercises summary jurisdiction. This means the judge performs the functions of prosecutor, judge and jury. He presents his own case, determines the law and decides the facts. Under these conditions, it would be difficult indeed, for him to remain impartial in a case involving a newspaper which has offended his dignity.

Safeguards Against Prejudices

Having concluded that a contempt proceeding is not the correct way to deal with 'publicity' which might tend to influence jurors, it would seem that those accused of a crime are left entirely at the mercy of the newspapers. Nothing could be further from the truth. The accused's rights are adequately protected by other safeguards which are a proper part of our judicial system.

1. *Change of Venue.* If the judge determines that "pretrial publicity" has made it difficult or impossible for the accused to obtain a fair trial, and that twelve impartial

jurors cannot be found in the county where the crime occurred, the trial may, at the judge's discretion, be moved to another locality. Generally, only one change of venue is allowed and the new locality is left to the judge's discretion.

2. *Change of Venire.* This is similar to a change of venue except jurors are brought in from another locality so their impartiality may be assured.

3. *Continuance.* Where public sentiment is running high against the accused, the judge may, in his discretion, grant a motion for continuance to allow time for the prejudicial feelings to subside.

4. *Severance.* This applies to cases with multiple defendants. The accused may move to have his case tried separately from the other defendants so as to avoid an adverse reflection on the merits of his own case arising from publicity directed at one or more of the co-defendants.

5. *Voir Dire.* In most jurisdictions the defendant is allowed to examine the jurymen at length, and challenge an unlimited number of them for 'cause.' An additional specified number of 'preemptory challenges are allowed.

6. *Blue Ribon Juries.* Often prejudices in the public at large can be overcome by installing a jury composed of particularly intelligent or 'knowledgeable' people who can more easily resist external influences in their determination of the case, or might not be affected by these influences because of their knowledge of the general subject matter of the case.

7. *Isolation of the Jury.* Isolating or "locking up" the jury is possible in all cases even though it is not always practical. The object, of course, is to isolate the jury from the harmful external influences after having been impaneled.

8. *Instructions.* The judge usually instructs the jury after all of the evidence has been submitted, prior to its retiring to the juryroom. But instructions may be given at any time during the trial. The instructions, for the most part, inform the juror as to the law of the case and as to those elements of evidence he should consider, and those he should not. By delimiting the areas of consideration, external influences are minimized.

9. *Retrial.* If all of the above safeguards fail to give the accused a fair trial, the trial judge may, at any time, declare a mistrial, or upon conclusion of the trial may grant a motion for a new trial.

10. *Appeal.* If a person is convicted of a crime and he believes that he was denied his fundamental right to a fair trial he may always make application to the appellate courts for review of his conviction.

11. *Habeas Corpus.* Whenever any person is convicted of a crime and believes himself to be improperly incarcerated because his rights were denied him at trial, he may seek release by petitioning for a writ of *habeas corpus.* In such circumstances *habeas corpus* would lie even after time for appeal has expired.

As Justice Douglas once stated:[134]

> "The point is that our remedy for excessive comment by the press is not the punishment of editors, but the granting of new trials, changes in venue, or continuances to parties who are prejudiced."

Newspaper's Duty to Inform

Aside from the First Amendment protection afforded newspapers to *allow* them to publish, there is a strong

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[134] Address at the University of Colorado Law School, May 10, 1960 [The Public Trial and the Free Press, 33 Rocky Mt. L. Rev. 1 (1960)].

moral duty on newspapers which *requires* them to print all newsworthy information which comes to their attention and is in good taste. It would, therefore, be difficult for these newspapers to adhere to an externally inflicted code, as suggested by some as the solution to the Free Press-Trial problem.

The duty and right to inform is based on the necessity of an informed public. As Dr. Gainza Paz, editor of the Buenos Aires paper, *La Prensa,* said in speaking before the American Newspaper Publishers Association after having been driven from his country:

> "People all over the world want to know what is going on. Their need is legitimate and imperative. It is the duty of newspapermen to satisfy it. If we fail—if we complacently accept limitations imposed on the people's right to know what is going on,—then their other rights are condemned to disappear too." [135]

In March of 1965, President Johnson recognized the need to furnish the public with details of the apprehension of criminals. On March 25, 1965 a Detroit civil rights worker was murdered in Alabama for her participation in the much publicized Selma to Montgomery civil rights march. The President informed the people over nationwide television that four suspects had been arrested and that they were members of the Ku Klux Klan. He went on to accuse that organization of having used "the rope and gun and tar and feathers" to terrorize its neighbors. And he accused its members of loyalty not to the United States "but to a society of hooded bigots."

Clearly, the President did not consider the dissemination of this material incompatible with the ends of justice.

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[135] Hanson, Address Before the Lee Memorial Journalism Foundation, Washington & Lee University, 16 Ala. L. Rev. 248 (1955).

An editorial on this subject in the Flint (Michigan) Journal [136] stated:

> "Mr. Johnson put the right of the people to know and the protection of law abiding citizens ahead of the contention of some, including the Genesee County prosecutor, that crime publicity is not compatible with justice."

British System Incompatible

One solution to the "pretrial publicity" problem often advanced but not regarded seriously by those cognizant of the history behind the First Amendment, is that we revert to the British system on contempt. The Supreme Court cited Madison on this point in *New York Times* v. *Sullivan*: [137]

> "• • • His [Madison's] premise was that the Constitution created a form of government under which 'The people, not the government, possess the absolute sovereignty.' The structure of the government, dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels. This form of government was 'altogether different' from the British form, under which the Crown was sovereign and the people were subjects. 'Is it not natural and necessary, under such different circumstances,' he asked, 'that a different degree of freedom in the use of the press should be contemplated?' Id., p. 569, 570. Earlier, in a debate in the House of Representatives, Madison had said: 'If we advert to the nature of Republican Government, we shall find that the censorial power in the people over the Government, and not in the Government over the people.' 4 Annals of Congress, p. 934 (1974). • • •"

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[136] March 28, 1965.

[137] 376 U.S. 254 (1964).

As the history previously set forth illustrates, the British law of contempt is incompatible with the First Amendment.

It was the English abuse of such personal freedoms, as freedom of the press, which ultimately led this country to seek independence.

Supreme Court's View of the Amendments Involved

In order to understand the full impact of the Court's "incorporation" of the First Amendment into the Fourteenth, it is necessary to look at the recent decision of *Pointer* v. *Texas.*[138] In *Pointer,* the Court incorporates a section of the Sixth Amendment into the Fourteenth, and in *dictum* states that the Sixth Amendment is a fundamental right, and that the entire Sixth Amendment should be "incorported" into the Fourteenth. This *dictum* puts the First Amendment and the Sixth Amendment on the same footing—both are considered fundamental rights by the Supreme Court.

There is a substantial segment of the present and past Supreme Court bench that believes there is a difference in the freedom granted by the different amendments. Justice Frankfurter interprets the various First Amendment cases as follows:

> "• • • free speech, press, and assembly are protected by the Fourteenth, despite the lack of specific mention of them, because 'the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions' • • •"[139]
>
> "• • • the cases are reasoning that the Fourteenth prevents state intrusion upon 'fundamental personal

[138] 380 U.S. 400 (1965).

[139] Frankfurter *"Incorporation" of Bill of Rights,* 78 Harv. L. Rev. 746, 748 (1965).

> rights and liberties,' that among those rights and liberties are free speech, press, etc., which the First Amendment explicity protects against federal encroachment, and that, because they are fundamental (not because they are contained in the First Amendment), they fall within the scope of the prohibitions of the Fourteenth. • • •"[140]

In one of the concurring opinions in the *Pointer* case, Justice Harlan points out that this decision "is another step in the onward march of the long-since discredited 'incorporation' doctrine.[141] Harlan feels the conviction should be reversed because the Sixth Amendment's rights are 'implicit in the concept of ordered liberty."[142] Harlan states his opinion as follows:

> "• • • The concept of Fourteenth Amendment due process embodied in *Palko* and a host of other thoughtful past decisions now rapidly falling into discard, recognizes that our Constitution tolerates, indeed encourages, differences between the methods used to effectuate legitimate federal and state concerns, subject to the requirements of fundamental fairness 'implicit in the concept of ordered liberty.' The philosophy of 'incorporation,' on the other hand, subordinates all such state differences to the particular requirements of the Federal Bill of Rights (but see *Ker* v. *California, supra,* at 34) and increasingly subjects state legal process to enveloping federal judicial authority. 'Selective' incorporation or 'absorption' amounts to little more than a diluted form of the full incorporation theory. Whereas it rejects full incorporation because of recognition that not all of the guarantees of the Bill of Rights should be

[140] *Id.* at 749.

[141] Supra note 138 at 409.

[142] *Ibid.*

deemed 'fundamental', it at the same time ignores the possibility that not all phases of any given guaranty described in the Bill of Rights are necessarily fundamental." [143]

This clearly indicates that some members of the Court are still of the opinion, expressed earlier by Jefferson and Madison, that there exist some differences in the Amendments, and that if one were put against another, those that are fundamental would prevail over those that are not.

Justice Frankfurter points out in his recent article [144] that many of the Supreme Court decisions do not use the word "incorporate," and therefore it is incorrect to assume that this is the theory intended to be applied.

> " 'The First Amendment, and the Fourteenth through its absorption of the First. . .' *Minersville School District* v. *Gobitis,* 310 U.S. 586, 593.
>
> " 'We have repeatedly held that the Fourteenth Amendment has made applicable to the states the guaranties of the First.' *Douglas* v. *City of Jeannette,* 319 U.S. 157, 162.
>
> " 'It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.' *Board of Education* v. *Barnette,* 319 U.S. 624, 639.
>
> " 'The First Amendment, which the Fourteenth makes applicable to the states. . . .' *Murdock* v. *Pennsylvania,* 319 U.S. 105, 108.

[143] *Ibid.*

[144] Supra note 139.

> " 'The First Amendment, as made applicable to the states by the Fourteenth. . . .' *Everson* v. *Board of Education,* 330 U.S. 1, 8.
>
> " 'the First Amendment (made applicable to the States by the Fourteenth). . . .' *McCollum* v. *Board of Education,* 333 U.S. 203, 210." [145]

From this Frankfurter concludes that there still exists the differences in the various Amendments; some are fundamental and some are not.

It must be remembered that the opinions expressed by Harlan and Frankfurter have never been recorded in anything but concurring opinions, and therefore it may be tenuous to assume that their theory is any more valid than that expressed in the doctrine of "incorporation."

It should be noted that there is also the previously quoted language of the *Pennekamp* case which indicates that in the borderline cases where a free press is in conflict with a fair trial, freedom of the press should prevail. Here the Court clearly makes a distinction between these two rights.

Conclusion

Upon analysis, it becomes obvious that the problem of "pretrial publicity" has been greatly exaggerated. Only on very rare occasions has the press been guilty of improprieties, and only on even rarer occasions have the previously outlined safeguards failed to protect the accused from these improprieties. Travesties on justice may be occasioned by judges' improprieties as well as by those of newspapermen.

[145] *Ibid.*

As stated by the late Elisha Hanson:[146]

> "If it be contended that reporters and broadcasters occasionally are guilty of bad taste or bad manners, then it may be retorted that so also are judges and lawyers and litigants. But the question is not one of taste or manners or how to control or correct them. There is no more excuse for an ill-mannered or inaccurate reporter than there is for an ignorant, intemperate, arbitrary or corrupt judge. Unfortunately, we have suffered from all, but because of our suffering we should not lose sight of the more fundamental issue as to the right of the people to receive information on the conduct of judicial proceedings free from censorship or other forms of restraint by those who conduct them. Nor should we lose sight of the fact that the vast majority of our judges are able, fair and possessed of the highest sense of duty; as are also the vast majority of those who report and comment on judicial proceedings."

Jefferson believed that:

> "The basis of our government being the opinion of the people—the way to prevent irregular interpositions of the people is to give them *full information of their affairs* through the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people." [Emphasis added].

Only by maintaining its freedom unfettered, can the press fulfill its obligations.

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[146] Supra note 135.

Bibliography

Beman, *Censorship of Speech and the Press*

Bird & Merwin, *The Newspaper and Society* (1942)

Blackstone, *Blackstone's Commentaries*

Bowers, *Hamilton and Jefferson*

Bowers, *Jefferson in Power*

Brant, *James Madison, Father of the Constitution* (1950)

Brucker, *Freedom of Information* (1949)

Busch, *Law and Tactics in Jury Trials* (Encyclopedic ed. 1959)

Chafee, *Free Speech in the United States* (1941)

Chafee, Freedom of the Press

Cooley, *Constitutional Limitations* (Eighth ed.)

Cross, *The People's Right to Know* (1953)

Curtis, *History of the United States Constitution*

Elliot, *Debates on the Federal Constitution* (1866)

Ford, *Writings of Thomas Jefferson*

Frank, *Courts on Trial* (1950)

Hale & Benson, *The Law of the Press*

Hallam, *Constitutional History of the English Constitution*

Hamilton, Madison & Jay, *The Federalists*

Hand, *The Bill of Rights* (1958)

Hocking, *Freedom of the Press: A Framework of Principle* (1947)

Holdsworth, *A History of English Law* (7th Rev. ed. 1956)

Hume, *History of England*

Hunt, *Writings of James Madison*

Jessup, *The Bill of Rights and Its Destruction by Alleged Due Process of Law*

Parton, *Life of Thomas Jefferson*

Patterson, *Free Speech and A Free Press* (1939)

Pound, *Criminal Justice in America* (1945)

Rutland, *The Birth of the Bill of Rights*, 1776-1794

Schofield, *Essays on Constitutional Law and Equity*

Schofield, *Freedom of the Press in the United States* (1914)

Seldes, *Freedom of the Press* (1935)

Siebert, Peterson & Schramm, *Four Theories of the Press* (1956)

Smyth, *Writings of Benjamin Franklin*

Stevens, *Sources of the American Constitution*

Sullivan, *Contempts by Publication, The Law of Trial by Newspaper* (3rd ed. 1941)

Swindler, *Problems of Law in Journalism* (1955)

Taylor, *Origin and Growth of the Constitution*

Thayer, *Legal Control of the Press* (1956)

Trevelyan, *History of England* (1926)

Warren, *The Making of the Constitution*

Wiggins, *Freedom or Secrecy* (1956)

Willis, *Constitutional Law of the United States*

Willoughby, *Constitutional Law of the United States*

Periodicals

Address Before the Lee Memorial Journalism Foundation, Washington & Lee University, Elisha Hanson, 16 Ala. Law. 248 (1955)

Bar and the Press, A. J. Goldberg, 53 Ill. B.J. 716 (1965)

Case Against Trial by Newspaper: Analysis & Proposal, 57 N.W.L.R. 217 (1962)

Congress Shall Make No Law, O. John Rogge, 56 Mich. L. Rev. 33 (1958)

Contempt by Publication, 59 Yale L. J. 534 (1947)

Contempt by Publication & the First Amendment, J. W. Oliver, 27 Mo. L. Rev. 171 (1962)

Ensuring Fair Trials and a Free Press: A Task for the Press & Bar Alike, J. C. Daily, 50 ABAJ 1037 (1964)

Fair Trial and Free Press: No Fundamental Clash Between the Two, Florence E. Allen, 41 A.B.A.J. 887 (1955)

Fair Trial—Freedom of the Press, N.J. Freedmon, 3 Osgoode Hall L.J. 52 (1964)

Fair Trial v. *Free Press in Criminal Trials,* 47 Cal. L. Rev. 366.

Fair Trial v. *Freedom of the Press in Criminal Cases,* 35 Temple L.Q. 412 (1962)

Fair Trial With a Free Press, 21 Vital Speeches of the Day, 793 (1954)

First Amendment Rights & Restrictions, D.H. Shell, 36 Miss. L.J. 41 (1964)

Firstness of the First Amendment, The, Cohn, 65 Yale L. Rev. 464 (1956)

Free Press; Fair Trial—Rights In Collision, 34 N.Y.U.L. Rev. 1278 (1959)

Free Press and a Fair Trial, V. Royster, 43 N.C.L.R. 364 (1965)

Free Press and a Fair Trial: England v. *United States,* 13 West Res. L. Rev. 147 (1961)

Free Press and a Fair Trial in English Law, D. M. Gillmor, 22 Washington and Lee L. Rev. 17 (1965)

Free Press and a Fair Trial—Placing Responsibility, S. Mosk, 5 Santa Clara L. J. 107 (1965)

Free Press and an Independent Judiciary, Elisha Hanson, 41 A.B.A.J., 217 (1955)

Free Press v. *Fair Trial: A Continuing Dialogue,* D.M. Gillmor; J.A. Barron, 41 N.D. L. Rev. 156 (1965)

Free Press Versus Fair Trial: The Contributions of Mr. Justice Frankfurter, G. D. Hainbough, Jr., 26 U. Pitt. L. Rev. 431 (1955)

Free Trial and Fair Press, 39 Minn. L. Rev. 431 (1955)

Freedom of Expression and the Function of Courts, 61 Harv. L. Rev. 1 (1951)

Freedom of Speech and Freedom of the Press, A. L. Goodhart, 1964 Wash. U.L.Q. 248

Freedom of Speech and of the Press in the Federalist Period: The Sedition Act, Carroll, 18 Mich. L. Rev. 615 (1920)

How can "Trial by Newspapers" Be Avoided? A League Committee Explores the Question, H. U. Feibelman, 70 Com. L.J. 100 (1060)

Incorporation of Bill of Rights, Felix Frankfurter, 78 Harv. L. Rev. 746 (1965)

News Media Coverage of Criminal Cases and the Right to a Fair Trial, Warren Freedman, 40 Neb. L. Rev. 391 (1961)

Newspaper Advertising, An Interference with a Fair Trial by Jury, 22 U. Pitt. L. Rev. 601 (1961)

On the Meaning of the First Amendment: Absolutes in the Balance, W. Mendleson, 50 Calif. L.R. 821 (1962)

Press Comment on Pending Criminal Trials, 38 Va. L. Rev. 1057 (1952)

Press and the Opposed—A Study of Prejudicial News Reporting in Criminal Cases, C. Jaffe, 56 J. Crim. Law 1 (1965)

Press Participation in Criminal Trials, 33 Chi-Kent L. Rev. 338

Pre-Trial Publicity as a Denial of Due Process, 36 Miss. L.J. 369 (1965)

Prior Restraint of Speech and Press—A Critique of the Doctrine, 15 Ala. L.R. 456 (1963)

Prior Restraint—The Constitutional Question, 42 B.U.L. Rev. 357 (1962)

Public Information, Criminal Trials and the Cause Celebre, Ronald Goldfarb, 36 N.Y.U.L. Rev. 810 (1961)

Public Trial and the Free Press, The, Douglas, 33 Rocky Mt. L. Rev. 1 (1960)

Public Trials and The Free Press, W. O. Douglas, 2 PEALQ 54 (1962)

Reconciling Fair Trial and Free Press, Grover C. Hall, Jr., 18 Ala. Law 404

Relation Between the Right to a Fair Trial and the Right of Freedom of the Press, The, Alexander Holtzoff, 1 Syracuse L. Rev. 369 (1950)

Right to a Fair Trial, L.F. Powell, 51 ABAJ 534 (1965)

Right of Public and Press to be Admitted to a Criminal Trial, 35 Tex. L. Rev. 429

Right to a Public Trial, Radin, 6 Temp. L.Q. 381 (1932)

Rights of Newspapers to Print What They Choose, The, Eustace Cullinan, 41 A.B.A.J. 1020 (1955)

Should Canon 35 Be Amended? A Question of Fair Trial and Free Information, R. P. Tinkham, 42 A.B.A.J. 834 (1956)

Some Observations on the Four Freedoms of the First Amendment, Henry S. Drinker, 18 B.U.L. Rev. 1 (1957)

Trial by Newspaper, Roger Foster, 144 North Am. Rev. 524 (1887)

APPENDIX D

FREE PRESS — FAIR TRIAL

The Supreme Court and Juror Prejudice Created by the News Media

Appendix "A" dealt with, among other things, freedom of the press, the law as to the contempt power of the courts and the procedural safeguards afforded an accused to assure him a fair trial by an impartial jury.

This appendix presents only the law, as enunciated by the Supreme Court decisions, as to allegedly prejudicial news coverage of criminal cases before, during and after trial. The purpose of this paper is not to see what sanctions might be applied against newspapers, but rather to determine the factors which have led the Supreme Court to grant or deny a new trial in cases involving publicity by the news media.

Under the Sixth Amendment to the Constitution of the United States, and under every state constitution, the right of a criminal defendant to be tried by an impartial jury is expressly or implicitly guaranteed. The constitutions of thirty-nine states have a guarantee of an impartial jury similar to that of the Federal Constitution, and in the other eleven states, the guarantee is inferable from a right to a trial by jury.[1] Furthermore, a fair trial by an impartial jury is guaranteed in state cases by the due process clause of the Fourteenth Amendment.[2] With regard to the right to "a speedy and public trial by an impartial jury," the Supreme Court stated in 1866:

> "* * * If ideas can be expressed in words, and language has any meaning, this right—one of the most

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[1] Will, *Free Press* v. *Fair Trial,* 12 DePaul L. Rev. 197, 199 N. 7.

[2] In re Oliver, 333 U.S. 257 (1948); In re Murchison, 349 U.S. 133 (1955).

valuable in a free country—is preserved to everyone accused of crime who is not attached to the Army or Navy or Militia in actual service."[3]

The issue, therefore, is the difficult one of determining whether or not a juror is impartial. The difficulty is compounded by the fact that often a juror will unconsciously harbor a bias which, regardless of his earnest intentions, he is unable to overcome. Even if he is able to set it aside, his knowledge of the prejudicial material often causes him unconsciously to place the burden of proof on the defendant rather than forcing the prosecution to prove its case. In addition, a juror may be well aware that he has a particular prejudice, but may conceal the truth because he would like to be thought of as a "prejudice-free" individual. Similarly, to avoid the focus of attention, a juror may deny having read prejudicial material after having been admonished by the Judge not to do so.

It should be recognized that the outcome of each Supreme Court case turns on the particular facts involved and, therefore, the Court has set down only guidelines which necessarily leave the trial judge with great discretion.

It is the allegation of the news media's ability to create prejudice or bias in the jury with which we are here concerned. Factual reports concerning evidence which has already been admitted at trial usually pose no problem. According to newspaper critics, the problem is usually created by publication of erroneous or slanted materials or by the publication of factual materials which are inadmissible as evidence. The two most often cited examples of this latter problem are the publication of confessions and prior criminal records. What these critics must realize is that a major difficulty for the newspaper editor lies in attempting to foresee what the Judge will consider admis-

[3] Ex parte Milligan, 4 Wall (71 U.S.) 2, 18 L. ed. 281 (1866).

sible. The Supreme Court stated in 1907 in *Patterson* v. *Colorado*:[4]

> "The theory of our system is that conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

As will be seen from the cases, *infra,* the fact that a juror has been exposed to prejudicial material does not automatically disqualify him. If he indicates to the Judge's satisfaction that he is able to set aside any opinion he may have developed as to the guilt or innocence of the accused, he may be considered a qualified juror. Some of the later cases further suggest, however, that a factual situation might be such, where the prejudice is extreme and has permeated the entire community, that partiality will be presumed as to the entire jury.

The Courts also consider the part the defendant and his counsel have played in attempting to combat the prejudicial influence. The Courts have considered whether or not the defendant was responsible for any of the prejudicial publicity, whether he took advantage of the *voir dire* to secure an impartial jury, whether he used all of his peremptory challenges, whether he moved for a continuance, whether he requested a change of venue and whether he moved for a mistrial. While these factors may not be determinative of a defendant's right to a new trial, they have often strongly influenced the Court.

It is important that a defendant conduct an extensive *voir dire* prior to trial so that an appellate court will have a complete record to review. Without such a record the reviewing court must speculate as to whether or not the jurors were prejudiced, a step they are usually unwilling to take.

[4] 205 U.S. 454 at 462 (1907).

Similarly, if the defendant learns in the course of the trial that the jurors may have had access to prejudicial material he should immediately request that the jury be interrogated as to these facts. Otherwise, the appellate court again has no record to review, and it is unlikely it will look favorably upon the appeal. An additional problem for the trial attorney is that if he requests that the jurors be interrogated, he often will point up the prejudicial publicity and work to the defendant's detriment. The attorney finds himself in the dilemma of wanting to protect his point on appeal and yet not prejudice the defendant in his trial.

THE CASES

Many cases invoking the Fourteenth Amendment have been reversed because of jury bias brought about by a variety of circumstances. But here we are primarily concerned with cases where *newspaper* publicity has been considered as a prejudicial factor. Two recent cases involving television will also be considered.

The first Supreme Court case of any significance on this subject was *United States* v. *Reid*,[5] an 1851 case involving murder aboard an American ship on the high seas. The defendant moved the lower court for a new trial because of, among other things, the misbehavior of two jurors in reading a newspaper account of the evidence adduced at the trial while the trial was in progress. The defendant submitted affidavits of the two jurors indicating that they had read parts of the report, but it did not influence their judgment in any way. With regard to the propriety of receiving these affidavits and their impact upon the Court if received, the Court stated as follows:

> "The first branch of the second point presents the question, whether the affidavits of jurors impeaching their verdict ought to be received.

[5] 12 How (53 U.S.) 361, 13 L. ed. 1023 (1851).

> "It would perhaps hardly be safe to lay down any general rule upon this subject. Unquestionably such evidence ought always to be received with great caution. But cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice. It is, however, unnecessary to lay down any rule in this case, or examine the decisions referred to in the argument. Because we are of opinion that the facts proved by the jurors, if proved by unquestioned testimony, would be no ground for a new trial. There was nothing in the newspapers calculated to influence their decisions, and both of them swear that these papers had not the slightest influence on their verdict."[6]

In 1878 the Court decided *Reynolds* v. *United States*[7] which set forth the first guidelines on this subject and has been quoted in many of the Court's subsequent opinions. This was a bigamy case where the defendant cited, as two of his grounds for appeal, the facts that the challenges of certain jurors by the accused were improperly overruled and that certain other challenges by the government were improperly sustained. In an attempt to analyze what is necessary in order that a juror be considered impartial, the Court first quoted from several old English cases. The Court then said:

> "All of the challenges by the accused were for principal cause. It is good ground for such a challenge that a juror has formed an opinion as to the issue to be tried. The courts are not agreed as to the knowledge upon which the opinion must rest in order to render the juror incompetent, or whether the opinion must be accompanied by malice or ill-will; but all unite in holding that it must be founded on some evidence, and

[6] *Id.* at 366.

[7] 98 U.S. 145, 25 L. ed. 244 (1878).

be more than a mere impression. Some say it must be positive, *Gabbet,* Cr. L., 391; others, that it must be decided and substantial, *Armistead's Case,* 11 Leigh, 659; *Wormeley* v. *Com.,* 10 Gratt., 658; *Neely* v. *The People,* 13 Ill., 685; others, fixed, *State* v. *Benton,* 2 Dev. & B. L., 196; and still others, deliberate and settled, *Staup* v. *Com.,* 74 Pa. 458; *Curley* v. *Com.,* 84 Pa., 151. All concede, however, that, if hypothetical only, the partiality is not so manifest as to necessarily set the juror aside."[8]

The Court then quoted from Chief Justice Marshall's opinion in *Burr's Trial:*[9]

"Light impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him."

The Court in *Reynolds* then went on to say:

"The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.

[8] *Id.* at 155.

[9] 1 *Burr's Trial,* 416.

It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause *the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality.* The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. *The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest.* No less stringent rules should be applied by the reviewing court in such a case than those which govern in the considerations of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court." [Emphasis added].[10]

After considering the particular facts of this case, the Court stated that there was not here such a manifestation of partiality as to leave nothing to the "conscience or discretion" of the triers. That while the juror had some hypothetical opinion of the case, there was not such as to raise a manifest presumption of partiality. It was recognized that often the manner of the juror while testifying is often more "indicative of the real character of his opinion than his words" and that the trial judge is usually better able to assess the situation; and, therefore, a reviewing court should not reverse rulings below upon questions of fact except in clear cases. The Court then stated:

"The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opin-

[10] Supra note 7, at 155.

ion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside, and it will not be error in the court to refuse to do so." [11]

From the above it can be seen how difficult it is to lay down rules or even guidelines regarding such an ephemeral factor as what has transpired in the mind of a juror.

In 1886 the Supreme Court decided *Hopt* v. *Utah*.[12] This was a murder case wherein one of the grounds for appeal involved the ruling of the trial court upon several challenges of the jurors. The Territory of Utah had, at the time, several territorial acts regulating proceedings in criminal cases. One such act stated:

> "No person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury [juror], founded upon public rumor, statements in public journals, or common notoriety; provided it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters submitted to him. The challenge may be oral, but must be entered in the minutes of the court or of the phonographic reporter." [13]

The defendant on appeal complained of the lower court's refusal to allow challenges for cause as to four jurors. Three of the four were preemptorily challenged by either the defendant or the district attorney, and the defendant had several preemptory challenges which he had not used when the jury was completed. Therefore, as to the three,

[11] Supra note 7, at 157.

[12] 120 U.S. 430, 30 L. ed. 708, 7 S. Ct. 614 (1886).

[13] *Act of the Territory of Utah*, Laws 1884, p. 124.

the defendant's cause could not have been prejudiced because the defendant did not exhaust his peremptory challenges. With regard to the fourth juror, he admitted having heard of the case through the newspapers and read what was represented to be the evidence. He further admitted that he had talked about it since that time; that he had formed a qualified opinion, but that he did not think he had ever expressed that opinion. He went on to explain that it would take evidence to remove this opinion, but that he thought he could sit as a juryman as if he had never heard of the case and that what he had heard did not make the least difference. On cross examination he stated that he could sit on the jury and determine the case without reference to anything he had heard and that he was not conscious of any bias or prejudice that might prevent him from dealing with the defendant impartially and, further, that he thought he could try the case according to the law and the evidence. On re-examination, he further stated that he would be guided by the evidence all together, without being influenced by any opinion he might then have or may have previously formed.

The Court in upholding the statute and refusing to reverse defendant's conviction stated:

> "By the express terms of the Statute of 1884 he could not be disqualified as a juror for an opinion formed or expressed upon statements in public journals, if it appeared to the court, upon his declaration under oath or otherwise, that he could and would, notwithstanding such an opinion, act impartially and fairly upon the matters submitted to him. We think that evidence, or what purports to be evidence, printed in a newspaper is a 'statement in a public journal' within the meaning of the statute; and that the judgment of the court upon the competency of the juror in such cases is conclusive." [14]

[14] Supra note 12, at 434.

It should be noted that here the Court felt that the defendant's failure to exercise all of his peremptory challenges was significant as to the first three jurors complained of, but not determinative as to the fourth. Here, also, note the difference between opinion and prejudice. A juror is competent even though he has formed an opinion through reading a newspaper article if he states he is without prejudice and will be impartial and decide the case only on the evidence and the law.

The following year, in 1887, the Court decided *Ex Parte: Spies.*[15] Here the Court dismissed an appeal from a conviction of murder. As one ground for appeal, defendant challenged the validity of an Illinois statute which provided in part:

> ". . . that it shall not be a cause of challenge that a juror has read in the newspapers an account of the commission of the crime with which the prisoner is charged, if such juror shall state on oath that he believes he can render an impartial verdict according to the law and the evidence: And provided further, that in the trial of any criminal cause, the fact that a person called as a juror has formed an opinion or impression, based upon rumor or upon newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall upon oath state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement."[16]

The Court cited *Hopt* v. *Utah* [17] to the effect that no injury is done the defendant if his challenge for cause is disallowed and he thereafter peremptorily challenged the juror if, after the jury is impaneled, he still had other peremptory challenges which he could have used.

[15] 123 U.S. 131, 31 L. ed. 80, 8 S. Ct. 21 (1887).

[16] *Id.* at 167.

[17] Supra note 12.

The Court then stated that the Illinois statute was not repugnant to the Constitution of that State which has a provision regarding an impartial jury similar to that of the United States Constitution, and that it was not repugnant to the United States Constitution. The Court next addressed itself to those jurors challenged for cause and selected after the defendant had used all of his peremptory challenges. It quoted at length from *Reynolds* v. *United States* [18] and concluded that:

> "If such is the degree of strictness which is required in the ordinary cases of writs of error from one court to another in the same general jurisdiction, it certainly ought not to be relaxed in a case where, as in this, the ground relied on for the reversal by this court of a judgment of the highest court of the State is, that the error complained of is so gross as to amount in law to a denial by the State of a trial by an impartial jury to one who is accused of crime. We are unhesitatingly of opinion that no such case is disclosed by this record." [19]

The Court here again displayed its unwillingness to overrule a lower court judge who had personally witnessed the testimony of the jurors on the *voir dire*. It should be noted that the statute says not only that the prospective juror must state upon oath that he believes he can "fairly and impartially render a verdict," but further that the Court must be "satisfied of the truth of such statement."

The case of *Simmons* v. *United States,*[20] decided in 1891, was an appeal from a conviction of aiding and abetting an

[18] Supra note 7.

[19] Supra note 15 at 180.

[20] 142 U.S. 148, 35 L. ed. 968, 12 S. Ct. 171 (1891).

embezzler and misapplying funds. Here the lower court judge discharged the first jury impaneled upon learning that one of the jurors had sworn falsely on his *voir dire* and that that juror and others had read an article caused to be published in the newspapers by the defendant, commenting on the evidence. Upon being convicted by a second jury, the defendant complained of the discharge of the first. To this the Supreme Court stated:

> "It needs no argument to prove that the judge, upon receiving such information, was fully justified in concluding that such a publication, under the peculiar circumstances attending it, made it impossible for that jury, in considering the case, to act with the independence and freedom on the part of each juror requisite to a fair trial of the issue between the parties. The judge having come to that conclusion, it was clearly within his authority to order the jury to be discharged, and to put the defendant on trial by another jury • • •"[21]

The Court thus once again upheld a trial judge's discretion in matters such as this.

In 1892, the Supreme Court decided the case of *Mattox* v. *United States*[22] involving a murder in that part of the Indian Territory which was part of the United States Judicial District of Kansas. The defendant submitted several affidavits of jurors, some of which stated that after the cause had been submitted to the jury and while the jurors were deliberating on their verdict and before they had agreed upon their verdict, a newspaper containing comment upon the case was introduced into the jury room and the comment was read to the jury. The article stated that the defendant would be a lucky man if he was not found guilty because the evidence against him was very

[21] *Id.* at 154.

[22] 146 U.S. 140, 66 L. ed. 917, 13 S. Ct. 50 (1892).

strong; that it was not expected the jury deliberation would last an hour; that the prosecuting attorney's speech was so strong that defendant's friends "gave up all hope of any result but conviction." The affidavits did not indicate what influence, if any, the reading of the newspaper had upon the jurors, but were confined to statements as to what they had read. The Court concluded that, while the evidence of jurors as to the motives and influence which affect their deliberation is inadmissible either to impeach or support the verdict, the Court may consider an affidavit concerning any facts which might have a bearing upon the question of the existence of any extraneous influence. Therefore, the affidavits stating that the newspaper had been read by the jurors was admissible, but any statement as to the effect of the articles on the minds of the jurymen was inadmissible. The Supreme Court considered the exclusion of the affidavits by the District Court as reversible error. Here, then, the reversal was based on exclusion of the affidavits by the District Court, *rather than on the presence of prejudicial publicity.*

Thiede v. *Utah*[23] was another case brought under the statute of the Territory of Utah.[24] One of the assignments of error was the overruling of defendant's challenges for cause directed against four jurors on the ground that on *voir dire* they had shown themselves incompetent to serve. The jurors had testified that they had read accounts in the newspaper concerning the murder involved, that they had formed certain impressions from their reading, *but that they could lay aside these impressions and try the case impartially on the evidence presented.* The Court ruled that the jurors' testimony clearly placed them within the terms of the statute of the Territory of Utah, and there was no error in overruling the challenges.

[23] 159 U.S. 510, 40 L. ed. 237, 16 S. Ct. 62 (1895).

[24] Supra note 13.

In *Holt* v. *United States*,[25] in 1910, the Supreme Court affirmed the Circuit Court of the United States for the Western District of Washington on a conviction for murder allegedly committed on a military reservation. Error was claimed by the defendant in that the lower court did not sustain a challenge for cause to a particular juryman. The juryman admitted he had taken the newspaper statements regarding the case for facts and that he had no opinion other than that derived from the papers, and that evidence would change it very easily, although "it would take some evidence to remove it." Further, he stated that he would make his decision according to the evidence or lack of evidence at the trial. Mr. Justice Holmes, in delivering the opinion of the Court, stated:

> "The finding of the trial court upon the strength of the juryman's opinions and his partiality or impartiality ought not to be set aside by a reviewing court unless the error is manifest, which it is far from being in this case. See *Reynolds* v. *United States*, 98 U.S. 145, 25 L. ed. 244; *Hopt* v. *Utah*, 120 U.S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614; *Spies* v. *Illinois*, 123 U.S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22."[26]

With regard to defendant's allegation that the jury had been allowed to separate and during the separation some members of the jury had read a newspaper article concerning the case, the Court stated that while it may be assumed that if they separated they did read matter concerning the case, that it is not to be automatically inferred from this that prejudice resulted. Justice Holmes stated:

> "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be

[25] 218 U.S. 245, 54 L. ed. 1021, 31 S. Ct. 2 (1910).

[26] *Id.* at 248.

> hard to maintain jury trial under the conditions of the present day."[27]

The Court, therefore, again confirmed its rulings in previous cases to the effect that a juror can be competent even though he has formed an opinion, and further that questions as to a juror's partiality are questions of fact to be reversed except "in very plain circumstances indeed." This case further buttresses the viewpoint that *the newspaper article involved must not only be capable of influence, but must in fact influence.*

One of the more notable cases in this field was the 1919 first degree murder trial of Robert F. Stroud,[28] now better known as the Birdman of Alcatraz. One of the principal grounds upon which reversal was sought was that the lower court erred in not granting a change of venue. This particular trial was for the murder of a guard at Leavenworth prison in Kansas. Prior to the date of trial, the local press had printed some of the testimony for the government as adduced in former trials of this same case. The judge excluded residents of Leavenworth County from the jury, but refused to grant a change of venue. Leavenworth County is one of fifty counties in the judicial division from which the jurors were selected. Certain jurors were challenged for cause on the ground that they favored capital punishment in cases of conviction for murder in the first degree. The Court recognized that as to one of these jurors the challenges should have been sustained. Since, however, he was peremptorily challenged and did not sit on the jury, and since the defendant was accorded two more peremptory challenges than the law required, appellant's cause was not prejudiced by the erroneous ruling below. The Court was unable to find that any of the jurors who heard the case below were objectionable and, therefore, refused

[27] *Id.* at 251.

[28] *Stroud* v. *U. S.*, 251 U.S. 15, 64 L. ed. 103, 40 S. Ct. 50 (1919).

to reverse the lower court's decision. This case perhaps best serves as an example of the use of safeguards available to insure that the defendant receives a trial by an impartial jury; and that the question of which safeguards should be invoked is best left to the discretion of the trial judge. Here the judge did not feel that the newspaper publicity required a change of venue, but in excluding residents of Leavenworth County from the jury he, in effect, accorded the defendant a change of venire.

Brief mention should be made of the case of *Moore* v. *Dempsey*.[29] Five Negroes appealed their first degree murder conviction by a trial court of the State of Arkansas. Appellants had been convicted of killing a white man. The case was reversed, *but not because of newspaper publicity*. The case so infected the emotions of the entire community that the Supreme Court concluded a fair trial would have been impossible "• • • no juryman could have voted for an acquittal and continued to live in Phillips County • • •." The case is mentioned here only because the Supreme Court account of the facts indicated that the newspapers had published inflammatory articles. It could not be said, however, that the newspaper accounts were responsible for the atmosphere of prejudice which is said to have permeated the entire community. The Court stated:

> "But if the case is that the whole proceeding is a mask,—the counsel, jury, and judge were swept to the fatal end by an irresistable wave of public passion, and that the state courts failed to correct the wrong,—neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this court from securing to the petitioners their constitutional rights." [30]

[29] 261 U.S. 87, 67 L. ed. 543, 43 S. Ct. 265 (1923).

[30] *Id.* at 91.

Except for the case of *Moore* v. *Dempsey* [31] and a relatively insignificant case called *Buchalter* v. *New York* [32] there were few cases on this subject between 1919 and 1951, the subject seeming to have been laid at rest by the Court's earlier opinions mentioned *supra*. In *Buchalter*, the appellant referred to unfair and lurid newspaper publicity, and claimed that the lower court had erred in its rulings on challenges to prospective jurors and in its refusal to grant a change of venue. Here the Supreme Court stated that it had reviewed the record and was unable to conclude that a "convincing showing of actual bias on the part of the jury which tried the defendant is established." The appellants complained of certain errors of state law and the Supreme Court indicated that the due process clause of the Fourteenth Amendment did not enable the Court to review such errors however material they might be under that law.

Starting in 1951 with *Shepherd* v. *Florida* [33] and continuing up to the present day, where the Supreme Court has just recently decided in *Sheppard* v. *Maxwell*,[34] the Court has considered a whole new wave of cases concerning jury prejudice allegedly created by the news media. In *Shepherd* v. *Florida*,[35] the defendants, four Negroes, were tried in Lake County, Florida and convicted of the rape of a white girl. Again, there was the problem of community prejudice with feelings running so high that the defendants had been threatened with lynching; one defendant's parents' home had been burned as had the homes of two other Negro families; the National Guard had been called to protect other Negroes; and Negroes were forced to flee the com-

[31] Supra note 29.

[32] 319 U.S. 427, 87 L. ed. 1492, 63 S. Ct. 1129 (1943).

[33] 341 U.S. 50, 95 L. ed. 740, 71 S. Ct. 549 (1951).

[34] 384 U.S. 333, 16 L. ed. 2d 600, 86 S. Ct. — (1966).

[35] Supra note 33.

munity. The newspapers had published as a fact that the defendants had confessed, and attributed this information to the sheriff. No confession of any sort was offered at the trial. Motions for a continuance and a change of venue were denied. The Supreme Court reversed, *but only on the grounds of discrimination in selection of the jury, not because of newspaper publicity.* Justice Jackson, however, was joined by Justice Frankfurter in a concurring opinion which stated that they would have reversed because of the "prejudicial influences outside the courtroom," *particularly the newspaper publicity.* Jackson said,

> "But prejudicial influences outside the courtroom, becoming all too typical of a highly publicized trial, were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated." [36]

The concurring opinion cited the three leading contempt cases [37] which the Court had recently decided, and recognized that, in light of these cases, it was difficult for a trial judge to deal with press interference with the trial process. Jackson, said, however:

> "But if freedoms of press are so abused as to make fair trial in the locality impossible, the judicial process must be protected by removing the trial to a forum beyond its probable influence. Newspapers, in the enjoyment of their constitutional rights, may not deprive accused persons of their right to a fair trial. These convictions, accompanied by such events, do not meet

[36] *Id.* at 51.

[37] *Craig* v. *Harney,* 331 U.S. 367, 91 L. ed. 1546, 67 S. Ct. 1249; *Pennekamp* v. *Florida,* 328 U.S. 331, 90 L. ed. 1295, 66 S. Ct. 1029; *Bridges* v. *California,* 314 U.S. 252, 86 L. ed. 192, 62 S. Ct. 190 (See Appendix A to this report).

> any civilized conception of due process of law. That alone is sufficient, to my mind, to warrant reversal." [38]

Remember, however, that the Court's reversal was in fact based on discrimination in selecting the jury.

It is interesting to note that mention was made by Justice Jackson not only of the newspaper articles, but also of a cartoon published at the time the grand jury was considering the case. The cartoon showed four electric chairs and was entitled "No compromise—Supreme penalty." Jackson did not indicate, whether, to his mind, such a cartoon would, by itself, constitute sufficient prejudicial publicity to warrant reversal.

The next year, in 1952, the Supreme Court was again confronted with a claim that a trial lacked fundamental fairness because of the circumstances surrounding it. Note that the appellants in these cases have switched their attack from particular jurors to general unfairness. In *Stroble* v. *California,*[39] the defendant was convicted of the first degree murder of a six year old girl. He had previously been arrested for molesting a small girl. Excerpts of a confession were released to the newspapers by the district attorney, who at the same time offered his opinion that the defendant was both guilty and sane. The defendant was arraigned the following morning. One of the principal allegations supporting the claim of an unfair trial was the publication of inflammatory newspaper reports inspired by the district attorney. The papers had labeled the defendant a "werewolf", "fiend" and "sex mad killer." The Supreme Court affirmed the conviction and rejected the contention that unfairness or prejudice resulted from the publication of the confession in the newspaper. Since the confession was read into the record at the preliminary hearing four days after the newspaper

[38] Supra note 35, at 52.

[39] 343 U.S. 181, 96 L. ed. 872, 72 S. Ct. 599 (1952).

account was published, the Court felt the defendant had not been prejudiced:

> "Petitioner's trial itself was reported by Los Angeles newspapers, usually on inside pages. Petitioner makes no objection to this phase of the newspaper coverage except for the newspaper's occasional reference to petitioner as a 'werewolf.'
>
> "While we may deprecate the action of the District Attorney in releasing to the press, on the day of petitioner's arrest, certain details of the confession which petitioner made, we find that the transcript of that confession was read into the record at the preliminary hearing in the Municipal Court on November 21, four days later. Thus in any event the confession would have become available to the press at that time, for '[w]hat transpires in the court room is public property.' *Craig* v. *Harney, supra* (331 US at 374, 91 L ed 1551, 67 S. Ct. 1249). Petitioner has not shown how the publication of a portion of that confession four days earlier prejudiced the jury in arriving at their verdict two months thereafter." [40]

The Court then stated that petitioner had failed to show that the newspaper accounts "aroused against him such prejudice in the community as to 'necessarily prevent a fair trial.'" The Court's remarks with reference to petitioner's failure to move for a change of venue were significant:

> "At the outset, it should be noted that at no point did petioner move for a change of venue, although the California Penal Code explicitly provides that whenever 'a fair and impartial trial cannot be had in the county' in which a criminal action is pending, the action may, upon motion of the defendant, be removed to 'the proper court of some convenient county free

[40] *Id.* at 193.

> from a like objection.' Of course petitioner's failure to make such a motion is not dispositive of the issue here, since the state court did not decide against petitioner on this ground but rather rejected on the merits his federal constitutional claim." [41]

The Court further suggested that it was significant that petitioner's counsel saw no need to seek a transfer of the action to another county because of the prejudicial newspaper accounts. The Court noted that the matter of the newspaper accounts was first brought to the trial court's attention after the defendant's conviction, in support of a motion for a new trial. In answer to this contention, the trial court stated that the jurors all had been thoroughly examined and had definitely stated that the defendant would be given the benefit of the presumption of innocence, and that there is nothing to show that the jurors ever saw or read the newspapers. To this finding by the trial court the Supreme Court stated:

> "Petitioner does not challenge this statement of the court. Indeed, at no step of the proceedings has petitioner offered so much as an affidavit to prove that any juror was in fact prejudiced by the newspaper stories. He asked this Court simply to read those stories and then to declare, over the contrary finding of two state courts, that they necessarily deprived him of due process. That we cannot do, at least where, as here, the inflammatory newspaper accounts appeared approximately six weeks before the beginning of petitioner's trial, and there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury. It is also significant that in this case the confession which was one of the most prominent features of the newspaper ac-

[41] *Ibid.*

counts was made voluntarily and was introduced in evidence at the trial itself." [42]

Justice Frankfurter dissented from the Court's refusal to reverse petitioner's conviction. He was concerned over the claim that the trial lacked fundamental fairness, particularly because it was a district attorney who had initiated the stories carried by the news media. Here Frankfurter again brought to the fore the view earlier expressed by Justice Jackson and himself in *Shepherd* v. *Florida supra* to the effect that there should be restraints placed on the publication of news concerning a defendant before trial. Thus the British concept to which Frankfurter remained wedded for the rest of his life, began to appear in dissenting opinions of the Court:

> "Jurors are of course human beings and even with the best of intentions in the world they are, in the well-known phrase of Holmes and Hughes, JJ., 'extremely likely to be impregnated by the environing atmosphere. *Frank* v. *Mangum*, 237 U.S. 309, 345, 59 L ed. 969, 987, 35 S.Ct. 582. Precisely because the feeling of the outside world cannot, with the utmost care, be kept wholly outside the courtroom every endeavor must be taken in a civilized trial to keep it outside. To have the prosecutor himself feed the press with evidence that no self-restrained press ought to publish in anticipation of a trial, is to make the State itself through the prosecutor who wields its power a conscious participant in trial by newspaper, instead of by those methods which centuries of experience have shown to be indispensible to the fair administration of justice." [43]

[42] *Id.* at 195.

[43] *Id.* at 201.

With regard to the prosecutor's participation in the publicity, Frankfurter stated:

> "And so I cannot agree to uphold a conviction which affirmatively treats newspaper participation instigated by the prosecutor as part of "the traditional concept of the 'American way of the conduct of a trial.'" [44]

Some of the factors which are interesting to note concerning the *Stroble* case are that the Court, in considering the likelihood of partiality existing in the jury, considers the lapse of time between the damaging publicity and the trial; that if publicity of doubtful admissibility is subsequently admitted as evidence, the defendant cannot complain of being prejudiced; that a defendant must prove actual rather than speculative prejudice; that the Court looks unfavorably upon publicity initiated by the prosecutor or other representative of the state. As in previous cases, the fact that the defendant had not used all possible procedures to remedy the pre-trial publicity was considered significant but not dispositive. Thus, in *Stroble* v. *California* [45] the Court basically reaffirmed its traditional views. Much comment resulting from this case showed that a segment of jurists and lawyers were interested in adopting the minority views of Jackson and Frankfurter as expressed in *Shepherd* [46] and *Stroble*. It is from these dissenting opinions that one may conclude that the Free Press-Fair Trial dialogue began to become more noticeable.

Again in 1952 the Supreme Court considered a case involving newspaper publicity in *Leviton* v. *United States*.[47]

[44] *Ibid.*

[45] Supra note 39.

[46] Supra notes 33 and 39.

[47] 343 U.S. 946, 96 L. ed. 1350, 72 S. Ct. 860 (1952).

The defendant's petition for Writ of Certiorari was denied, but Justice Frankfurter filed a memorandum indicating that he thought it would be helpful in understanding the exercise of the Court's discretionary jurisdiction in granting or denying certiorari. This case involved the finding in the jury room of a copy of a newspaper containing an article which had erroneous information as to the facts of the case. Justice Frankfurter quoted from the Court of Appeals majority and dissenting opinions. The majority opinion stated in part:

> "We do not think, however, that such a report, erroneous as it was, made a fair trial impossible. The judge gave very explicit instructions that the contents of the article were to be disregarded and went on to point out how the offenses set forth in the indictment differed from those described in the article. Trial by newspaper may be unfortunate, but is not new and, unless the court accepts the standard judicial hypothesis that cautioning instructions are effective, criminal trials in the large metropolitan centers may well prove impossible." [48]

The Court of Appeals dissent stated in part:

> "My colleagues admit that 'trial by newspaper' is unfortunate. But they dismiss it as an unavoidable curse of metropolitan living (like, I suppose, crowded subways). They rely on the old 'ritualistic admonition' to purge the record. The futility of that sort of exorcism is notorious. As I have elsewhere observed, it is like the Mark Twain story of the little boy who was told to stand in a corner and not to think of a white elephant. Justice Jackson, in his concurring opinion in *Krulewitch* v. *United States*, 336 U.S. 440, 453, 69 S. Ct. 716, 723, 93 L. Ed. 790, said that, "The naive assumption that prejudicial effects can be over-

[48] *Id.* at 947.

> come by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.' " [49]

In 1956 in *U.S. ex rel Darcy v. Handy*,[50] the Court again refused to reverse a conviction wherein it was alleged that publicity had surrounded the trial. The petitioner had been convicted of murder in the first degree and sentenced to death. The case reached the Supreme Court through habeas corpus proceedings in the Federal District Court, wherein petitioner alleged he had been denied a fair trial. There were four defendants involved in a robbery-murder, but on motion by counsel, the cases were severed so that petitioner's case was heard separately from the others. One of petitioners objections was the fact that two of the four defendants involved were tried just a week prior to his trial and that he suffered from the attendant adverse publicity. The Court stated that there was no indication of an atmosphere of hysteria and prejudice and that the proceedings were factually reported in the press. The Court reiterated the fact that it was incumbent upon the petitioner to show the unfairness of his trial:

> "While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.' *Adams* v. *United States*, 317 US 269, 281, 87 L ed 268, 276, 63 S Ct 236, 143 ALR 435." [51]

[49] *Id.* at 948.

[50] 351 U.S. 454, 100 L. ed. 1331, 76 S. Ct. 965 (1956).

[51] *Id.* at 42.

The Court then went on to state:

> "We have examined petitioner's allegations, the testimony and documentary evidence in support thereof, and his arguments. We conclude that the most that has been shown is that, in certain respects, opportunity for prejudice existed. From this we are asked to infer that petitioner was prejudiced." [52]

The Court next discussed the safeguards afforded any defendant including the *voir dire* examination and the right of peremptory challenge. Also mentioned was the protection available through severance of the trials of the defendants and, further, the protections afforded by continuances and changes of venue:

> "In the instant case, notwithstanding the fact that counsel for petitioner did not use all of his peremptory challenges after a searching examination of prospective jurors on voir dire, and did not seek a continuance of the trial or a change of venue, petitioner asks this Court, in effect, to infer that the news coverage of the robbery and proceedings prior to petitioner's trial, including the Foster-Zeitz trial, created such an atmosphere of prejudice and hysteria that it was impossible to draw a fair and impartial jury from the community or to hold a fair trial. The failure of petitioner's counsel to exhaust the means provided to prevent the drawing of an unfair trial jury from a community allegedly infected with hysteria and prejudice against petitioner while not dispositive, is significant." [53]

Justices Harlan, Frankfurter and Douglas dissented on other grounds.

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[52] *Id.* at 462.

[53] *Id.* at 463.

All of the cases considered thus far have been state cases presented to the Supreme Court on the basis of the denial of due process under the Fourteenth Amendment. In 1959, however, in the case of *Marshall* v. *United States,*[54] the petitioner was convicted in the United States District Court for the District of Colorado on a charge of unlawfully dispensing certain drugs in violation of a federal statute. The Court granted certiorari because of doubts whether exposure of some of the jurors to newspaper articles was "so prejudicial in the setting of the case as to warrant the exercise of our supervisory power to order a new trial." Here the Supreme Court clearly indicated that it was exercising its general supervisory power over the lower federal courts and was not limited, as in state cases, to determining whether or not "due process" had been afforded the defendant. The newspaper accounts involved told of petitioner's previous record of convictions and contained other prejudicial information involving evidence found at the time of arrest. The trial judge, on learning that the jury had read these news accounts, interrogated the jurors and was told that they would not be influenced by the news articles and that they could decide the case only on the evidence and that no prejudice had resulted from the reading of the articles. The Court recognized that the trial judge has great discretion on ruling on matters such as this but stated:

> "We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence." [55]

The Court then again made it clear that it was acting in its supervisory capacity:

> "In the exercise of our supervisory power to formulate and apply proper standards for enforcement of

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[54] 360 U.S. 310, 3 L. ed. 2d 1250, 79 S. Ct. 1171 (1959).

[55] *Id.* at 312.

the criminal law in the federal courts (*Bruno* v. *United States,* 308 US 287, 84 L ed 257, 60 S Ct 198; *McNabb* v. *United States,* 318 US 332, 87 L ed 819, 63 S Ct 608), we think a new trial should be granted." [56]

In 1961, the Court granted certiorari in *Janko* v. *United States,*[57] another case emanating from a Federal court. Defendant had been convicted of income tax evasion under the Federal Code. There had been newspaper and radio accounts of the defendant's former convictions, including a prior conviction in the present case which had been set aside. The jurors had, however, been warned on several occasions not to read these accounts and when asked generally by the judge whether they had been influenced by any outside sources, they replied they had not. The issue of publicity prejudice was raised in the Court of Appeals and in an unusual move the Supreme Court granted the petition for certiorari and reversed and remanded the case all in the same memorandum. No opinion was given by the Supreme Court. Here, the Court was again exercising its supervisory power over the lower federal courts, and this case added nothing to the law already established in the *Marshall* case. Neither *Marshall* nor *Janko* are relevant to the due process issue presented by those cases emanating from state courts.

Also in 1961, and in fact slightly prior to the *Janko* decision, the Court decided what is considered by many to be the most important case on this subject, *Irvin* v. *Dowd.*[58] Prior to this time the Supreme Court had never reversed a *state court* conviction on the sole ground of prejudice of the jury resulting from comments by the news media. For a complete understanding of this case, a review of the overwhelming facts indicating prejudice is necessary.

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[56] *Id.* at 313.

[57] 366 U.S. 716, 6 L. ed. 2d 846, 81 S. Ct. 1662 (1961).

[58] 366 U.S. 717, 6 L. ed. 2d 751, 81 S. Ct. 1639 (1961).

Irvin, the petitioner, had been indicted for murder in Indiana and because of the publicity surrounding the crime of which he was accused, he was granted a change of venue to an adjoining county, but was denied under state law a second change of venue and also was denied a continuance. He was convicted in the second county and sentenced to death. His appeal to the Supreme Court was based on an alleged violation of due process in that he did not receive a fair trial. Six murders had been committed in December of 1954, and four in March of 1955 in the county in which he was indicted. Petitioner was arrested in April of 1955 and shortly thereafter police officials issued press releases to the effect that the petitioner had confessed to the six murders. Opinions as to petitioner's guilt and the punishment which he should receive were solicited on the streets and broadcast over the local radio stations. Scores of newspaper headlines, pictures, cartoons and articles were printed in the local press which was delivered regularly to approximately ninety-five percent of the homes in the second county in which he was tried. The newspaper and radio stories included references to his juvenile record, his convictions for arson and burglary and his military courtmartial. In addition, these stories accused him of being a parole violator and stated that he had confessed to the six murders and had been indicted for four of them. Additionally, the press reported that petitioner had offered to plead guilty if spared the death sentence and that the prosecutor was determined to secure the death penalty. He was described as the "confessed slayer of six" and the stories stated that he had additionally confessed to twenty-four burglaries.

In looking at the jury itself, the Court found that the panel consisted originally of 430 persons. The trial court itself excused 268 on challenges for cause; 103 were excused because of conscientious objection to the death penalty, and the maximum of twenty peremptory challenges were used by the petitioner. The state used only ten per-

emptory challenges. The *voir dire* record covered 2,783 pages and indicated that ninety percent of those examined on the point entertained some opinion as to guilt "ranging in intensity from mere suspicion to absolute certainty." Additionally, out of the twelve jurors finally selected, eight thought petitioner guilty.

The Court upheld its prior decisions and cited many of them as precedent. It stated that under our theory of the law, a juror who has formed an opinion cannot be impartial, but it went on to state:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Spies* v. *Illinois*, 123 US 131, 31 L ed 80, 8 S Ct 21, 22; *Holt* v. *United States*, 218 US 245, 54 L ed 1021, 31 S Ct 2, 20 Ann Cas 1138; *Reynolds* v. *United States* (US) supra." [59]

The Court then stated the tests set forth in *Reynolds* [60] including the fact that the affirmative of the issue is upon the challenger and he must show the actual existence of prejudice, and further that the finding of the trial court

[59] *Id.* at 722.

[60] Supra notes 7, 8, 9, 10.

"ought not to be set aside by a reviewing court unless the error is manifest." But the Court felt here that the buildup of prejudice was clear and convincing and that the bias was manifest. It stated that two-thirds of the jurors believed the petitioner guilty and had heard or read information which was inadmissible at trial, and these jurors openly admitted their prejudices. But each said he could be fair and impartial. To this the Court replied:

> "Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight." [61]

And the Court concluded that the circumstances were such that a reversal was mandatory:

> "With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt." [62]

Justice Frankfurter wrote a concurring opinion in which he stated:

> "How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception." [63]

[61] Supra note 58, at 728.

[62] *Ibid.*

[63] *Id.* at 729.

In analyzing this case, it must first be noted that the facts as to pre-trial publicity were the most extreme seen by the Court to that date. Aside from the general circumstances of deep and bitter prejudice, and aside from the revealing *voir dire* record of 2,783 pages which showed that eight out of the twelve jurors finally selected thought petitioner guilty, it should be noted that the newspaper articles contained the two items considered by a majority of the courts as the most harmful to the defendant; namely, the petitioner's prior criminal record and the fact of a confession. The case was reversed despite the fact that each juror claimed his ability to fairly try the facts. The Court felt that in view of the prevailing atmosphere and extreme circumstances, and notwithstanding the jurors' statements of their ability to render an impartial verdict, the jury could not possibly render a fair verdict.

The full significance of this case cannot, as yet, be ascertained. Certainly, it is significant in that, as previously mentioned, it was the first time the Supreme Court had reversed a state court conviction on the grounds that due process had not been accorded the petitioner, and that the trial was therefore fundamentally unfair, due primarily to the activities of the news media.

That it was the extreme nature of the factual situation that caused reversal by the Supreme Court rather than any revolutionary trend was borne out the following year, in 1962, when the Court declined to reverse a Washington state court in the case of *Beck* v. *Washington*.[64] Dave Beck, a labor union officer, had been convicted of embezzling union funds. His appeal to the Supreme Court was based primarily on the due process and equal protection clauses of the Fourteenth Amendment, in that adverse publicity had prevented the selection of a fair jury. Petitioner had moved to have the indictment quashed, moved three times for continuances and moved for a change of venue, which

[64] 39 U.S. 541, 8 L. ed. 2d 98, 82 S. Ct. 955 (1962).

motions were all denied. The newspaper stories centered around the fact that large amounts of money had been taken from the teamster labor union treasury and used for Beck's personal benefit. Much was also made of the fact that Beck had taken the Fifth Amendment a number of times during the hearing before the Select Committee on Improper Activities in the Labor or Management Field of the United States Senate. In his objection to the Grand Jury impaneled, petitioner did not contend that any particular juror was prejudiced or biased, but rather that the judge had failed to ascertain on *voir dire* whether the adverse publicity had influenced any of the jurors, and further that the judge had failed to adequately instruct the Grand Jury as to prejudice. The Court rejected these arguments stating that petitioner was furnished an unbiased grand jury and that the judge's instructions were adequate. The Court noted as to the instructions that for the trial judge to have dealt on the matter of the adverse publicity and explained petitioner's taking of the Fifth Amendment before the Senate Committee would have only added fuel to the fire, and been more harmful to petitioner in the long run.

Petitioner's objections to the petit jury again do not single out any particular jurors as being prejudiced, but rather state that the publicity surrounding the trial automatically prevented the selection of a fair jury and that any jury selected from the area in which he was tried must be considered presumptively biased. The Court pointed out that his trial came some nine months after he first appeared before the Senate Committee and five months after his indictment, and that the intensity of the adverse publicity had greatly diminished by the trial date. Additionally, the Court characterized the news accounts at the time of the trial as being "straight news stories rather than invidious articles which would tend to arouse ill will and vindictiveness." As to the jury itself, all persons summoned as prospective jurors in the trial of petitioner's father a month

prior were excused, as were all persons who had been in the courtroom at any time during petitioner's father's trial. Of fifty-two persons examined, only eight admitted any bias or even opinion as to petitioner's guilt. Six others suggested they might be biased or might have formed an opinion. All fourteen of these were excused, as were all jurors challenged for cause by petitioner's counsel. Petitioner also exercised all six peremptory challenges allowed him. On *voir dire* each juror selected indicated that he was not biased and that he had formed no opinion as to petitioner's guilt which would require any evidence to remove. After studying the *voir dire,* the Court stated that each juror's qualifications as to impartiality were far greater than that required by the Court in prior cases. Reference was then made to that portion of the *Irvin* v. *Dowd* [65] decision which held that the existence of a preconceived notion was not enough by itself where the juror can lay aside any opinion he might have and base his verdict on the evidence.

The Court stated:

> "We cannot say the pretrial publicity was so intensive and extensive or the examination of the entire panel revealed such prejudice that a court could not believe the answers of the jurors and would be compelled to find bias or performed opinion as a matter of law. Compare *Irvin* v. *Dowd,* supra (366 US at 723-728), where sensational publicity adverse to the accused permeated the small town in which he was tried, the voir dire examination indicated that 90% of 370 prospective jurors and two-thirds of those seated on the jury had an opinion as to guilt, and the accused unsuccessfully challenged for cause several persons accepted on the jury." [66]

[65] Supra note 58.

[66] Supra note 64, at 557.

The Court's refusal to reverse *Beck* v. *Washington* [67] clearly indicates that *Irvin* v. *Dowd* [68] was no radical departure from past precedents, but was rather an inescapable conclusion based on an extreme fact situation.

Note here, also, that in the *Beck* case the Court felt it significant that petitioner did not challenge for cause any of the jurors ultimately selected. The Court also quoted from *Darcy* v. *Handy* [69] to the effect that it should not be asking too much that the burden of showing the essential unfairness be sustained by the petitioner and that the showing be a "demonstrable reality," not just mere speculation. Neither Justice Frankfurter nor Justice White took part in the consideration or decision of the case; Justice Black joined by Chief Justice Warren dissented.

With the exception of *Sheppard* v. *Maxwell,* the Cleveland murder case which was just recently decided by the Supreme Court,[70] *Beck* v. *Washington* [71] was the last significant case wherein newspaper publicity was stated as the prime reason for asking for a new trial. There are, however, two television cases, *Rideau* v. *Louisiana* [72] decided in 1963 and *Estes* v. *Texas* [73] decided June 7, 1965. *Rideau* is not only another case of extreme facts, but it serves very well to show the possible difference between newspaper publicity and television publicity. While there is very little difference between a newspaper story and a news story being read by a television reporter, where, as in *Rideau,* an individual accused of a crime is shown on tele-

[67] Supra note 64.

[68] Supra note 58.

[69] Supra note 50.

[70] Supra note 34.

[71] Supra note 64.

[72] 373 U.S. 723, 10 L. ed. 2d 663, 83 S. Ct. 1417 (1963).

[73] 381 U.S. 532, 14 L. ed. 2d 543, 85 S. Ct. 1628 (1965).

vision actually confesses, the impact on the viewing public is far different than that of a newspaper story. A few hours after a combination bank robbery, kidnapping and killing in Louisiana, the petitioner, Wilbert Rideau, was apprehended by the police and incarcerated over night. The following morning a twenty-minute film with sound track was made of an interview in the jail between petitioner and the sheriff. In the course of the interview, the sheriff interrogated petitioner and petitioner admitted his responsibility for the robbery, kidnapping and murder. The film was shown over a local television station once each day for three consecutive days and was seen by a total audience of approximately 106,000 people. (This does not mean that 106,000 different people saw the interview, but only that there were a total of 106,000 viewers on the three occasions, some may have seen the interview two or three times.) The parish in which petitioner was tried had approximately 150,000 residents. There is no way of knowing how many of these 150,000 actually saw the film.

Petitioner's motion for a change of venue, based primarily on the television interview, was denied and he was convicted and sentenced to death on the charge of murder. Two members of the jury which convicted petitioner were deputy sheriffs of the parish in which the trial was held, and three members of that jury had stated on *voir dire* that they had seen the televised interview. Prior to the selection of these five jurors, petitioner had used all of the peremptory challenges allowed him, and his request that they be challenged for cause was denied.

The Court held that the question of who initiated the interview, whether it was petitioner, the representative of the State or some third party, was not important because the result in any case would be a denial of due process in refusing to grant the request for a change of venue. The Court stated:

> "For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." [74]

The Court then went on to state:

> "The case now before us does not involve physical brutality. The kangaroo court proceedings in this case involved a more subtle but no less real deprivation of due process of law. Under our Constitution's guarantee of due process, a person accused of committing a crime is vouchsafed basic minimal rights. Among these are the right to counsel, the right to plead not guilty, and the right to be tried in a courtroom presided over by a judge. Yet in this case the people of Calcasieu Parish saw and heard, not once but three times, a 'trial' of Rideau in a jail, presided over by a sheriff, where there was no lawyer to advise Rideau of his right to stand mute." [75]

Of great significance in this case is the fact that the Court said it would not hesitate in holding that this was a denial of due process "without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury." This is significant because, prior to this time, much emphasis had been placed by the Court on the *voir dire* since it was felt that only through the *voir dire* could a reviewing court establish a particular bias or prejudice on the part of individual jurors. Without any substantial *voir dire* record, such prejudice would have to be presumed, a step the Court had heretofore been reluct-

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[74] Supra note 72, at 726.

[75] *Ibid.*

ant to take. Here, however, the effects of the telvision interviews were so extreme that the situation was considered inherently prejudicial by the Court. Note also that this case, like *Irvin* v. *Dowd* [76] involved the publication of a confession. The facts of the case were peculiar to television and, because of the defendant's personal appearance, it would be difficult to find an analogous situation created by newspaper publicity.

Notwithstanding the extreme factual situation, Justices Clark and Harlan dissented stating that:

> "Unless the adverse publicity is shown by the record to have fatally infected the trial, there is simply no basis for the Court's inference that the publicity, epitomized by the televised interview, called up some informal and illicit analogy to res judicata, making petitioner's trial a meaningless formality. See *Beck* v. *Washington*, 369 US 541, 8 L ed 2d 98, 82 S Ct 955 (1962)." [77]

The dissenting opinion went on to distinguish the situation in *Irvin* v. *Dowd* and finally stated:

> "As we recognized in Irvin, however, it is an impossible standard to require that tribunal to be a laboratory, completely sterilized and freed from any external factors. The determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge. And when the jurors testify that they can discount the influence of external factors and meet the standard imposed by the Fourteenth Amendment, that assurance is not lightly to be discarded. When the circumstances are unusually compelling, as in Irvin, the assurances may be discarded, but 'it is not asking too

[76] Supra note 58.

[77] Supra note 72, at 729.

> much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside.' " [78]

In 1965, in *Estes* v. *Texas*,[79] the Court reversed a conviction involving the televising and filming of the trial itself. There, again, petitioner himself was one of the television actors, as were the witnesses and the jury. *It should be understood at the outset that the Court granted certiorari only as to the questions emanating from allowing the trial to be televised. The Court specifically denied certiorari as to the question of pretrial publicity; therefore, a great deal of the opinions expressed by the various Supreme Court Justices are not pertinent to the subject here under study.* Nevertheless, the ultimate question was whether the due process clause of the Fourteenth Amendment had been violated in this case by allowing the Court proceedings to be televised. This is, therefore, another example of an abrogation of Fourteenth Amendment rights due to the activities of one of the news media. The Court reversed the lower court conviction by a five to four margin with five of the nine judges rendering separate opinions and with one Justice, in essence, rendering two opinions. In *Rideau*, the Court considered a set of circumstances so inherently prejudicial as to preclude the possibility of a fair trial, and it was not required that the circumstances of *possible* prejudice be tied to an actual fact of prejudice of particular *jurors*. On this point the Court in *Estes* stated:

> "In *Rideau* v. *Louisiana*, 373 U.S. 723 (1963) this Court constructed a rule that the televising of a defendant in the act of confessing to a crime was inherently invalid under the Due Process Clause of the Fourteenth Amendment even without a showing of

[78] *Id.* at 733.

[79] Supra note 73.

prejudice or a demonstration of the nexus between the televised confession and the trial." [80]

The Court then went on to make it clear that this was another case where the showing of actual prejudice was not a prerequisite to reversal:

> "The State, however, says that the use of television in the instant case was 'without injustice to the person immediately concerned,' basing its position on the fact that the petitioner has established no isolatable prejudice in these circumstances. The State paints too broadly in this contention, for this Court itself has found instances in which a showing of actual prejudice is not a prerequisite to reversal. This is such a case." [81]

The Court mentioned *Rideau* v. *Louisiana* [82] and *Turner* v. *Louisiana* [83] and stated:

> "In each of these cases the Court departed from the approach it charted in *Stroble* v. *California*, 343 U.S. 181 (1952), and in *Irvin* v. *Dowd*, 336 U.S. 717 (1961), where we made a careful examination of the facts in order to determine whether prejudice resulted. In Rideau and Turner the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it." [84]

The Court discussed separately the effect on the witnesses, the jurors, the judge and the defendant of televising the proceedings, and concluded that if any of the four

[80] *Id.* at 538.

[81] *Id.* at 542.

[82] Supra note 72.

[83] 379 U.S. 466, 13 L. ed. 2d 424, 85 S. Ct. 546 (1965).

[84] Supra note 73, at 543.

were affected by the presence of the television camera, the petitioner would not have been afforded due process. Therefore, it was the inherent prejudice in televising criminal trials that the Court sought to rectify. Justice Brennan, one of the four dissenting judges, noted in a "postscript" opinion that only four of the five justices voting for reversal considered televising criminal trials as "constitutionally infirm" under any circumstances and that the fifth judge voting for reversal, Justice Harlan, confined his objections to television in the courtroom in the subject case which was a "heavily publicized and highly sensational affair."

Justice Stewart's dissenting opinion expressed concern over the effect the majority opinion might have on future cases involving the First Amendment. ". . . I would be wary of imposing any *per se* rule which, in the light of future technology might serve to stifle or abridge true First Amendment rights." [85] With regard to the scope of the Court's review, Justice Stewart stated that three of the four separate constitutional claims were declined for review by the Court. As previously mentioned one of those which the Court refused to review was the claim that members of the jury "had received through the news media damaging and prejudicial evidence. . . ." [86] The dissent then stated that:

> "Because of our refusal to review the petitioner's claim that pretrial publicity had a prejudicial effect upon the jurors in this case, and because, insofar as the September hearings were an element of that publicity, the claim is patently without merit, that issue is simply not here. Our decision in *Rideau* v. *Louisiana*, 373 U.S. 723, therefore, has no bearing at all in this case." [87]

[85] *Id.* at 604.

[86] Petition for Writ of Certiorari, question 3, p. 3.

[87] Supra note 73, at 610.

Stewart concluded by stating:

> "The suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms." [88]

Estes v. *Texas*,[89] and its impact on the news media, is discussed at length in appendix "D."

While the case of *Turner* v. *Louisiana* [90] was not a newspaper or a television case, it warrants mention if for no other reason than that it was so often cited in *Estes* v. *Texas*.[91] The case was in fact decided some six months prior to *Estes*. There the two principal witnesses for the prosecution were deputy sheriffs who throughout the three-day murder trial were in "intimate association" with the jurors in that the jury was placed in their charge, so that they ate with the jurors, conversed with them, and did errands for them. The Court stated that the jury's verdict must be based on evidence developed at the trial and that, under the circumstances of the relationship these witnesses for the prosecution enjoyed with the jurors, it would have been impossible for the jurors to have confined their deliberations to that evidence. The Court pointed out that the petitioner's fate depended on how much confidence the jurors placed in these two witnesses and the association the witnesses had with the jury as their "official guardians" during the entire period of the trial precluded the possibility of a fair determination by the jurors.

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[88] *Id.* at 614.

[89] Supra note 73.

[90] Supra note 83.

[91] Supra note 73.

Through the foregoing cases the development of the law in this area can clearly be seen. While it would be difficult to deny that the Court in recent years has afforded the defendant a greater degree of protection from influences emanating from without the courtroom, the fact still stands that in only two cases involving a conviction in a state court, *Irvin* v. *Dowd* [92] and the recent *Sheppard* v. *Maxwell* case,[93] has the Supreme Court reversed the lower court on due process grounds because a fair trial in the particular locality involved was made impossible by publicity, primarily newspaper, surrounding the trial. The two important cases wherein the Court spoke of inherent prejudice as opposed to specific prejudice involved television publicity, and in those cases the defendants themselves were shown to the public. The law, set down in *Reynolds* v. *United States* [94] with regard to newspaper publicity, therefore, remains substantially intact. As can be seen in Appendix E to this report, dealing exclusively with *Sheppard* v. *Maxwell*,[95] the Supreme Court has not, in its latest opinion, changed its views in this area. The Court continues to consider the present legal safeguards as adequate to protect an accused and does not attempt to limit in any way Freedom of the Press.

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[92] Supra note 58.

[93] Supra note 34.

[94] 98 U.S. 145, 25 L. ed. 244 (1878).

[95] Supra note 34.

ATTACHMENT A

INFORMATION ON NEWS MEDIA COVERAGE OF CRIMES, THOSE ACCUSED OF CRIMES, AND CRIMINAL TRIALS, AS FOUND IN THE WEST REPORTER SYSTEM, WITH WEST "KEY NUMBERS" AND SAMPLE CASES INCLUDED.

1. *Newspapers:* Access to or reading as ground for new trial: Criminal Law § 924-½ (4).

   (a) 385 P. 2d 592
   (b) 193 A. 2d 817

2. *Newspapers:* On publication of newspaper article lauding state expert witness: Criminal Law § 867.

   (a) 179 F. 2d 646, affirmed 71 S. Ct. 581
   (b) 229 F. 2d 216
   (c) 218 F. 2d 97, *cert granted* 75 S. Ct. 603, *cert dismissed* 76 S. Ct. 191

3. *Newspapers:* New trial because papers found in jury room: Criminal Law § 1176.

   (a) 120 P. 2d 814

4. *Newspapers:* Receiving by jury: Criminal Law § 855 (5).

   (a) 225 F. 2d 220
   (b) 59 So. 2d 582
   (c) 247 S.W. 2d 952
   (d) 241 P. 2d 308
   (e) 46 N.W. 2d 158
   (f) 225 S.W. 2d 975

5. *Newspapers:* Statement by Court respecting not read-articles: Criminal Law § 957 (5).

   (a) 106 F. Supp. 906
   (b) 194 F. 2d 1, *cert den.* 72 S. Ct. 1042
   (c) 106 S.W. 2d 18

6. *Newspapers:* Continuance on ground veniremen read newspaper articles: Criminal Law § 591.

   (a) 65 So. 2d 525
   (b) 199 F. 2d 107
   (c) 204 F. 2d 105, *cert den.* 74 S. Ct. 36
   (d) 194 F. 2d 623, *cert den.* 72 S. Ct. 1058
   (e) 113 F. Supp. 253

7. *Newspapers:* Admonition to refrain from reading. Criminal Law § 852.

   (a) 167 P. 2d 535

8. *Newspapers:* New trial for Court's failure to instruct jury as to duties in respect to reading: Criminal Law § 922 (2).

   (a) 81 N.E. 2d 445

9. *Newspapers:* Jury picture in paper: Criminal Law § 1176.

   (a) 69 N.E. 2d 39

10. *Newspapers:* Reading by jury during trial: Criminal Law § 1174 (1, 6).

    (a) 72 N.E. 2d 286, *cert den.* 67 S. Ct. 1738
    (b) 46 N.E. 2d 103
    (c) 20 N.W. 2d 205
    (d) 54 So. 2d 921, *cert den.* 72 S. Ct. 564

11. *Newspapers:* Accounts of trial communicated to jury: Criminal Law §§ 1144 (15), 1163 (6).

    (a) 212 F. 2d 8, *cert den.* 75 S. Ct. 125
    (b) 261 S.W. 2d 784
    (c) 132 F. Supp. 69
    (d) 279 P. 2d 898
    (e) 72 N.E. 2d 286, *cert den.* 67 S. Ct. 1738

12. *Newspapers:* Change of venue due to newspaper accounts: Criminal Law § 121.

    (a) 225 F. 2d 123, *cert. den.* 76 S. Ct. 197
    (b) 205 F. 2d 343, *cert. den.* 74 S. Ct. 50
    (c) 169 F. 2d 739, *cert den.* 69 S. Ct. 51

13. *Newspapers:* Jury prejudice or bias on newspaper disclosure: Criminal Law § 126 (1).

    (a) 161 F. 2d 337, *cert den.* 67 S. Ct. 1744
    (b) 13 F.R.D. 296
    (c) 58 So. 2d 623
    (d) 288 P. 2d 57

14. *Newspapers:* Publicity prejudicing; interview after verdict to determine: Criminal Law § 957 (1).

    (a) 290 N.W. 534

15. *Newspapers:* Discharge of jury panel on ground that prospective jurors had read newspaper accounts: Jury § 116.

    (a) 220 F. 2d 252, *cert den.* 76 S. Ct. 53
    (b) 46 So. 2d 262
    (c) 47 N.W. 2d 349

16. *Newspapers:* Disqualification of jury members due to opinions founded: Jury §§ 100, 103 (11-14).

    (a) 46 N.W. 2d 508
    (b) 58 S.E. 2d 288, *cert den.* 70 S. Ct. 1013
    (c) 214 F. 2d 950

17. *Newspapers:* Criminal prosecution; prospective jurors not permitted to state what they read on voir dire: July § 131 (7).

    (a) 57 So. 2d 888, *cert den.* 73 S. Ct. 58
    (b) 35 N.W. 2d 142
    (c) 265 S.W. 2d 593, *cert den.* 74 S. Ct. 534

18. *Newspapers:* Examination by Court of jury as to whether they had seen newspaper articles: Jury § 131 (16).

    (a) 203 F. 2d 904
    (b) 51 S.S. 2d 13
    (c) 229 S.W. 2d 582

19. *Newspapers:* Fair Trial; preventing jury from reading paper: Jury § 100.

    (a) 46 N.W. 2d 508
    (b) 58 S.E. 2d 288 *cert den.* 71 S. Ct. 286
    (c) 108 F. 2d 625

ATTACHMENT B

Selected State Cases Relating to Newspaper Coverage of Crimes Causing Jurors to Acquire Opinions Regarding Defendant's Guilt or Innocence

1658—1896

Denver v. Moynahan	8 Colo. 56, Pac. 811
State v. Dent	7 S. 694
Sane v. LeDoff	15 So. 397
People v. O'Neill	65 N.W. 540
Parker v. State	55 Miss. 414
Commonwealth v. Beucher	10 Pa. Co. Ct. 3
State v. Summers	15 S.E. 369
Miller v. State	20 S.W. 1103
State v. George	La. Ann. 786
Zimmerman v. State	56 Md. 536
Palmer v. People	4 Neb. 68
Phelps v. People	72 N.Y. 334
State v. Kilgore	93 N.C. 533
Commonwealth v. Morrow	9 Phila. 583
Same v. Work	3 Pitt. R. 493
Hammil v. State	8 S. 380
Blackman v. State	7 S.E. 626
Pemberton v. State	38 N.E. 1096
Davenport Gas Light v. City of Davenport	13 Iowa 229
State v. Vatter	32 N.W. 506
State v. Smith	34 N.W. 597
State v. Jackson	37 La. Ann. 768
Foots v. State	7 Ohio St. 471
State v. Clark	42 Vt. 629
In Re Epes	5 Grat. 676
Little v. Commonwealth	25 Grat. 921
Thompson v. Updegraff	3 W.Va. 629

1897—1906

Dimmick v. U.S.	121 F. 638
People v. Owens	56 P. 251
People v. Nunley	76 P. 45
People v. Sowell	78 P. 717
State v. Brady	69 N.W. 290
State v. Herbert	28 S. 898
State v. Reed	38 S.W. 574
State v. Hunt	43 S.W. 389
State v. Bronstine	49 S.W. 512
State v. McGinnis	59 S.W. 83
State v. Forsha	88 S.W. 746
State v. Sakes	89 S.W. 851
Bolin v. Neb.	71 N.W. 444
Jahnke v. State	94 N.W. 158—reversed 105 N.W. 154
State v. Simas	62 P. 242
Wilson v. State	57 A. 954
Bratt v. State	41 S.W. 624
Morrison v. State	51 S.W. 358
Kegans v. State	955 W. 122
Smith v. Commonwealth	6 Grat. 696
State v. Harris	60 P. 58
State v. Willis	41 A. 820
State v. Young	74 N.W. 693
People v. Warner	82 P. 196
Haur v. People	46 N.E. 127
Shields v. State	49 N.E. 351
State v. Start	56 P. 15
State v. Kellogg	29 So. 285
People v. Quimby	96 N.W. 1061
Evans v. State	40 S. 8
State v. Gartell	71 S.W. 1045
State v. Myers	94 S.W. 242
State v. Howart	77 P. 50
State v. Rogers	77 P. 598
Woods v. State	41 S.W. 811

Wilkerson v. State	57 S.W. 956
State v. Haworth	68 P. 155
State v. Boyce	64 P. 719

1907—1916

Thomas v. State	43 S. 371
Cooke v. People	82 N.E. 371
State v. Palston	116 N.W. 1058
Dewein v. State	170 S.W. 582
People v. Loper	112 P. 720
People v. Duncan	96 P. 414
People v. Ruef	114 P. 54
Croft v. Chicago	109 N.W. 723
Schwartz v. State	60 S. 732
State v. Church	98 S.W. 16
State v. Bobbit	114 S.W. 511
State v. Sechrist	126 S.W. 400
State v. Walton	164 S.W. 211
Shane v. Boite	97 P. 958
Turner v. State	111 P. 988
State v. Crofford	96 W.W. 889
State v. Jacques	76 A. 652
Maxes v. State	145 S.W. 952
Myers v. State	160 S.W. 679
Wyres v. State	166 S.W. 1550
Myers v. State	177 S.W. 1167

1916—1926

Folkes v. State	82 S. 567
Branscum v. State	203 S.W. 13
Gibson v. State	205 S.W. 898
Murchison v. State	240 S.W. 402
Pondexter v. State	263 S.W. 375
People v. Craig	235 P. 721
People v. Fong Sing	175 P. 911
People v. Potigian	231 P. 593
People v. Berman	147 N.E. 428

State v. Garrett	226 S.W. 4
State v. Connor	252 S.W. 713
Grammar v. State	172 N.W. 41, rehearing denied 174 N.W. 507
King v. State	187 N.W. 934
State v. Bailey	102 S.E. 406
Harper v. State	200 P. 879
Elkins v. State	233 P. 491
Leard v. State	235 P. 243
State v. Faries	118 S.E. 620
State v. Mitchell	192 N.W. 487
Sapp v. State	223 S.W. 459
Willis v. State	239 S.W. 212
Nantz v. State	250 S.W. 695

1926—1936

Union Electric Light and Power Co. v. Snyder Estate Co.	65 F. 2d 297
Spear v. State	44 S.W. 2d 663
Green v. Commonwealth	4 S.W. 2d 1109
State v. Scruggs	116 S. 206
Donahue v. State	107 S. 15
State v. Vettere	248 P. 179
Manning v. State	292 S.W. 451
Johnson v. State	1 S.W. 2d 896
Willis v. State	81 S.W. 2d 693

1936—1946

Burnett v. State	126 S.W. 2d 277
People v. Wallace	59 P. 2d 115
State v. Bass	171 S. 829
People v. Schneider	14 N.W. 2d 819
State v. Biswell	179 S.W. 2d 61
Fleming v. State	72 P. 2d 403
Pugh v. State	186 S.W. 2d 258
Harrison v. Conn.	32 S.E. 2d 136

1946—1956

Medley v. U.S.	155 F.2d 857, 81 U.S. App. D.C. 85, cert. denied 66 S. Ct. 1377, 328 U.S. 873, 90 L. Ed. 1642, rehearing denied 67 S. Ct. 35, 329 U.S. 822, 91 L. Ed.
Finnegan v. U.S.	204 F. 2d 105, cert denied 74 S. Ct. 36, 346 U.S. 821, 98 L. Ed. 347, rehearing denied 74 S. Ct. 118, 346 U.S. 880, 98 L. Ed. 387
Darcy v. Handy	130 F. Supp. 270, affirmed 244 F. 2d 540, affirmed 76 S. Ct. 965, 351 U.S. 454, 100 L. Ed.
Buchanan v. State	218 S. W.2d 700
Gadd v. Com.	204 S.W. 2d 215
State v. Brazile	86 S. 2d 208
State v. Hinojosa	242 S.W. 2d 1
State v. Teeter	200 P. 2d 657
State v. Fouquette	221 P. 2d 404, 67 Nev. 505, cert. denied Fouquette v. State of Nev., 71 S. Ct. 799, 341 U.S. 932, 95 L. Ed. 1361, cert. denied 72 S. Ct. 369, 342 U.S. 928, 96 L. Ed.
State v. Steadman	59 S.E. 2d 168, 216 S.C. 579, cert. denied 71 S. Ct. 78, 340 U.S. 850, 205, 340 U.S. 849, 95 L. Ed.
Everett v. State	218 S.W. 2d 471

1956—1965

State v. LaRocca	194 A. 2d 578
Rizzo v. U.S.	304 F. 2d 810
Dupes v. State	354 S.W. 2d 453
Simmons v. State	130 S. 2d 860
State v. Geurts	359 P. 2d 12
People v. Duncan	350 P. 2d 103
State v. Taborsily	152 A. 2d 239
State v. David	111 S. 2d 778
Com. v. Richardson	40 A. 2d 828
State v. Flack	89 N.W. 230
State v. Brazile	99 S. 2d 62
State v. Edwards	94 S. 2d 674